TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 567.

JOHN W. TAPPAN, COLLECTOR OF TAXES, ETC., CHICAGO, APPELLANT,

vs.

THE MERCHANTS' NATIONAL BANK OF CHICAGO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 16, 1873.

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No. 567.

JOHN W. TAPPAN, COLLECTOR OF TAXES, ETC., CHICAGO, APPELLANT,

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1 Circuit court United States, northern district of Illinois, ss:

Pleas in the circuit court of the United States for the northern district of Illinois before the Hon. Henry W. Blodgett, judge of the district court of the United States for the northern district of Illinois, and on Thursday, the fifth day of December, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the 97th year.

W. H. BRADLEY, *Clerk.*

MERCHANTS' NATIONAL BANK OF CHICAGO
v.
JOHN W. TAPPAN, COLLECTOR OF THE TOWN of South Chicago. } 10644. Chancery.

Be it remembered that, on the twenty-second day of October, A. D. one thousand eight hundred and seventy-two, the said complainants, by their solicitors, filed in the office of the clerk of the circuit court
2 of the United States for the northern district of Illinois, their bill of complaint against said defendant, together with their bond for costs; which said bill of complaint and bond for costs read in the words and figures following, to wit:

Bond for costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, October term, A. D. 1872.

MERCHANTS' NATIONAL BANK OF CHICAGO
v.
JOHN W. TAPPAN, COLLECTOR, &C. } In chancery.

We enter ourselves security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by it, hereby agree and stipulate that execution may issue against our property for any costs taxed against it.

Dated this 22d day of October, A. D. 1872.

FULLER & SMITH.

3 (Endorsed:) Filed Oct. 22d, 1873. W. H. Bradley, clerk.

Bill of complaint.

In the circuit court of the United States for the northern district of Illinois.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

THE MERCHANTS' NATIONAL BANK OF CHICAGO
v.
JOHN W. TAPPAN, COLLECTOR OF THE TOWN of South Chicago. } Bill.

In the circuit court of the United States for the northern district of Illinois.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

To the honorable the judges of the circuit court of the United States for said district, in chancery sitting:

Your orator, the Merchants' National Bank of Chicago, brings this its bill of complaint against John W. Tappan, collector of the
4 town of South Chicago, in the county of Cook and State of Illinois, and thereupon your orator complains and says: That your orator is a banking corporation created under and by virtue of an act of Congress, approved June 3d, 1864, known as the national currency or national banking act, and was, prior to the year 1871, ever since has been, and still is, located in the said town of South Chicago, and in the northern district aforesaid, and that said collector resides in said town and district; that the exhibit hereto attached contains a full list of the owners and holders of the shares of the capital stock of your orators on the 1st day of April, A. D. 1871, the number of shares held by each, and the places of residence of each; and that, as appears from said exhibit, many of said shareholders do not reside in said State of Illinois, and many others who do reside therein, reside in Scholl & Park districts, towns and counties other than the town of South Chicago, the South Park district of the county of Cook in said State.
5 Your orator further shows unto your honors that there are many national banks located and doing business in the said town of South Chicago, with many millions of capital stock, and that their shareholders, to a large extent, reside outside of the State of Illinois, and many also in other towns & counties in said State than the town of South Chicago and county of Cook. And your orator further shows that there are many national banks, with millions of capital, located in other parts of Illinois than the county of Cook; and that in nearly every instance many of their shareholders reside in other towns & counties in said State than the town where such banks are respectively located; that under and in accordance with the provisions of the act of said State entitled "An act to provide for the assessment and collection of taxes on the shares of capital stock in banks and banking associations," approved June 13, 1867, State, county, town, and district taxes for the year 1871, have been lately pretended to be levied upon all the shares of the capital stock of your orator, with reference to the
6 value and ownership thereof on the 1st day of April, A. D. 1871, such taxes being at the rate of twenty-six mills upon the dollar on the assessed value of said shares, which was fixed by the assessor of said town at the sum of something over one-third the par value thereof in accordance with the limit of valuation prevailing throughout said county.

That a warrant for the collection of said taxes has been issued and delivered said John W. Tappan, collector of said town.

That said collector, under the authority of said warrant, has demanded of your orator payment of said taxes, which amount, in the aggregate, upon all the shares of said stock, to about the sum of $4,005.64 (dollars,) and that they be deducted from any dividends which may be declared upon said capital stock, and threatens to sell said shares by virtue of said warrant, unless your orator complies with such request.

Your orator further shows that, in the assessment-roll of personal

property in the said town of South Chicago, for the said year of 1871, for which said taxes are levied, and also in said warrant, the names of the said holders of shares in your orator's capital stock are stated, and separately opposite thereto, in appropriate columns, are also stated the residence of each shareholder, the number of shares held by each, and the assessed value thereof; and in said warrant the amount of
7 tax levied on the shares of each shareholder is also stated opposite his, her, or its name.

Your orator further shows that said taxes are illegal and void for the following reasons:

Because they were levied in the absence of said stockholders residing in places other than the said town of South Chicago, and no jurisdiction was ever obtained of them, or of the shares held by them.

Because the said act of June 13, 1867, in accordance with and under which said taxes were pretended to be levied, is void.

Because they are contrary to the Constitution of the United States and the said national banking act and the acts amendatory thereof.

Because said act of June 13, 1867, is contrary to and in violation of the provisions of article 9 of the constitution of the State of Illinois, and therefore void, and for other good and sufficient reasons.

Your orator further shows that its said shareholders refuse to pay said taxes and forbid the payment thereof by your orator, and threaten a multiplicity of suits against your orator in case it does pay the same, or in case it deducts the amount thereof from any dividends upon said stock.

That if said collector sell said stock irreparable damage will be done said stockholders.

8 That your orator is the trustee of its said stockholders, and as such is entitled to protect their interests.

And that said sale would also prejudice your orator in the public mind, and work damage to it incapable of remedy at law.

Your orator well hoped defendant would have ceased his threats aforesaid, and that such pretended taxes would have been cancelled.

But now so it is, may it please your honors, that said defendant refuses so to do, and in excuse thereof sets up a variety of unfounded pretences, all of which are contrary to equity, and tend to the manifest wrong and injury of your orators in the premises.

In consideration whereof, and forasmuch as your orator can only have relief in a court of equity, where matters of this nature are properly cognizable and relievable, and to the end that the defendant may, if he can, show why your orator should not have the relief hereby prayed, and may, without oath, (his answer, under oath, being hereby expressly waived,) full, true, direct, and perfect answer make to all and singular the matters aforesaid, and that as fully and particularly as if he had been distinctly interrogated thereto; and that the said pretended
9 taxes may be cancelled and be declared void, and the collection thereof perpetually enjoined; and that the said Tappan, and his successors in office, be perpetually enjoined from any attempt to collect said taxes, and from selling, or attempting to sell, said shares, or any of them; and that your orator may have such other or further relief as the nature of its case may require and as shall be agreeable to equity:

May it please your honors to grant unto your orator not only the writ of injunction issuing out of and under the seal of this honorable court, to be directed to the said John W. Tappan, collector of the town of South Chicago, restraining him as above prayed, but also a writ of subpœna directed to him commanding him to appear and answer the prem-

ises, and to abide by and perform such decree therein as to your honors shall seem meet. And your orator will ever pray, etc.

MERCHANTS' NATIONAL BANK.
By FULLER & SMITH, *Its Solicitors.*

STATE OF ILLINOIS,
County of Cook, City of Chicago, ss:

C. B. Blair, being duly sworn, says he is the president of the complainant in the above bill; that he has read said bill and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters stated on information and belief, and as to those he believes them to be true.

C. B. BLAIR, *Pres't.*

Sworn to and subscribed before me this 22nd day of October, A. D. 1872.

{ NOTARIAL SEAL. }

JOSEPH E. SMITH,
Notary Public.

TOWN COLLECTOR'S OFFICE FOR SOUTH CHICAGO,
Cook County, State of Illinois:

CHICAGO, 187 .

Received of Merchants dollars and cents, in full of State, county, town, and South Park taxes due for the year 1871, on the following described real estate and personal property, as valued below, to wit:

Description.	Page.	sec.	T.	R.	sub-lot.	lot.	block.	valuation.	Total tax.
W. Blair, South Division, Chicago,						250		shares..	222 54
C. B. Blair,	do.					2,095		" ..	1,864 91
Lyman Blair,						600		" ..	534 10
Dan'l A. Jones, South Div., Chicago,						350		" ..	311 54
E. T. Watkins,	do.					200		" ..	178 04
J. H. Dunham,	do.					55		" ..	48 94
J. K. Botsford,	do.					110		" ..	97 89
John Barker,	do.					150		" ..	133 53
Fred. Haskell,	do.					50		" ..	44 49
T. M. Avery, West Div., Chicago,						50		" ..	44 51
Martin Ryerson, West Chicago,						100		" ..	89 00
Sol. A. Smith, South Div., Chicago,						50		" ..	44 51
W. W. Avery, dec'd,						50		" ..	44 49
C. J. Blair, South Div., Chicago,						50		" ..	44 51
H. C. Wilson, W'st Div., Chicago,						50		" ..	44 49
John Reynolds, Terre Coupe, St. Jo. Co., Ind,						240		shares	213 64
Anna F. Pope, New Bedford, Mass.						50		shares.....	44 51
									$4,005 64

(Endorsed.) Filed Oct. 22d, 1872. W'm H. Bradley, cl'k.

Afterwards, to wit, on said 22d day of October, A. D. 1872, a writ of subpœna issued out of said clerk's office against said defendant in said entitled cause; which said writ, together with the memorandum & notice of application for injunction thereto attached, and also the return of the marshal thereon, is in the words and figures following, to wit:

12 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to John W. Tappan, collector of the town of South Chicago, greeting:

We command you that you appear before our judges of our circuit court of the United States of America for the northern district of Illinois, at Chicago, in said district, on the first Monday in the month of December next, to answer the bill of complaint of The Merchants' National Bank of Chicago, this day filed in the clerk's office of said court, in said city of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 22nd day of October, in the year of our Lord one thousand eight hundred and seventy-two, and of our Independence the ninety-seventh.

[SEAL OF COURT.] W'M H. BRADLEY, *Clerk.*

MEMORANDUM.—The above defendant is notified that, unless he shall enter his appearance in the clerk's office of said court, at Chicago aforesaid, on or before the day to which the above writ is returnable, the complainant's bill will be taken against him as confessed, and a decree entered accordingly.

W'M H. BRADLEY, *Clerk.*

13 Circuit court of the United States of America, northern district of Illinois, ss:

MERCHANTS' NATIONAL BANK OF CHICAGO *vs.* JOHN W. TAPPAN, COLLECTOR, &C. } In chancery. October term, A. D. 1872.

To John W. Tappan, collector, or to James P. Root, county attorney:

Take notice that the complainant will move this honorable court, on the 23 day of October, A. D. 1872, or as soon thereafter as counsel can be heard, that a writ of injunction issue against the within-named defendant, in accordance with the prayer of the bill herein.

Yours, &c.,

FULLER & SMITH,
Compl'ts Solicitor.

Dated this 22d day of October, A. D. 1872.

14 I served the within subpœna, with notice of motion thereon endorsed, upon John W. Tappan, therein named, by delivering a true copy of said subpœna and notice to him personally on the 22d day of October, A. D. 1872.

B. H. CAMPBELL,
U. S. Marshal,
By S. H. TOURTELLOTTE,
Deputy.

(Endorsed:) Filed Oct. 23, A. D. 1872. W'm H. Bradley, clerk.

Afterwards, to wit, on the 23d day of October, A. D. 1872, in the record of the proceedings of said court in chancery in said entitled cause, appears the following entry, to wit:

THE MERCHANTS' NATIONAL BANK OF CHICAGO
vs.
JOHN W. TAPPAN, COLLECTOR. } Chancery.

Now comes the complainant, by his solicitor, and moves the court for an injunction against the defendant herein; and it appearing to the court that the defendant had been duly notified of this application, and no objection being made, it is ordered that the defendant be enjoined and re'trained, as prayed for in the bill, and that a writ of injunction issue for that purpose.

15 And thereupon an injunction-writ issued in said entitled cause against said defendant; which injunction-writ is in words and figures following, to wit:

Circuit court of the United States of America, northern district of Illinois, ss:

The United States of America to John W. Tappan, collector of the town of South Chicago, and to your counselors, attorneys, solicitors, trustees, and agents, and successors in office, and to each and every of them, greeting:

Whereas it hath been represented to the judges of our circuit court of the United States for the northern district of Illinois, in chancery sitting, on the part of The Merchants' National Bank of Chicago, complainant, in its certain bill of complaint, exhibited in our said circuit court, on the chancery side thereof, before the judges of said court, against you, the said John W. Tappan, to be relieved touching the matters complained of; in which said bill it is stated, among other things, that you are combining and confederating with others to injure the complainant, touching the matters set forth in the said bill, and that your actings and doings in the premises are contrary to equity and good conscience; and it being ordered that a writ of injunction issue out of said court, upon said bill, enjoining and restraining you, and each of you, as prayed for in said bill: We, therefore, in consideration thereof, and of the particular matters in said bill set forth, do strictly command you, the said John W. Tappan, collector of the town of South Chicago, your counselors, attorneys, solicitors, trustees, and agents, and successors in office, and each and every of you, that you do abso-

16 lutely desist and refrain from making any attempt to collect the taxes assessed against the shareholders of said bank for the year A. D. eighteen hundred and seventy-one, by the assessors of the town of South Chicago, in the county of Cook, and in said district, and from selling, or attempting to sell, the shares of said bank, or any of

17 them, until this honorable court, in chancery sitting, shall make other order to the contrary. Hereof fail not, under the penalty of what the law directs.

To the marshal of the northern district of Illinois to execute and return in due form of law.

Witness, the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Chicago, in said district, this 23rd day of October, in the year of our Lord one thousand eight hundred and seventy-two, and of our Independence the ninety-seventh year.

[SEAL OF COURT.] W'M H. BRADLEY, *Clerk*.

18 I served the within writ of injunction upon John W. Tappan, therein named, by delivering a true copy thereof to him personally on the 31st , A. D. 1872.

B. H. CAMPBELL, *U. S. Marshal.*
By S. H. TOURTELLOTTE, *Deputy.*

(Endorsed:) Filed Nov. 1, A. D. 1872. W'm H. Bradley, clerk.

Afterwards, to wit, on the 30th day of November, A. D. 1872, said defendant, by his solicitor, filed in said clerk's office his demurrer, and also a certificate and affidavit in said entitled cause, which are respectively in words and figures following, to wit:

Circuit court of the United States, northern district of Illinois. In chancery.

JOHN W. TAPPAN
ads.
THE MERCHANTS' NATIONAL BANK OF CHICAGO.

The demurrer John W. Tappan to the bill of complaint of the Merchant's National Bank of Chicago.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said complainant's said bill set forth & alledged, doth demur thereto, and for cause showeth that
19 the said complainant hath not, in and of his said bill, made or stated such a case as does or ought to entitle it to any relief as is thereby sought & prayed for from or against this defendant. Whereof this defendant demands the judgment of this honorable court, or that he shall be compelled to make any further or other answer to the said bill, or any of the matters & things therein contained; and prays hence to be dismissed with his costs, &c.

JAMES P. ROOT,
Solicitor for Def't.

(Endorsed:) Filed Nov. 30, 1872. W'm H. Bradley, cl'k.

Circuit court of the United States, northern district of Illinois. In chancery.

THE MERCHANTS' NATIONAL BANK OF CHICAGO
vs.
JOHN W. TAPPAN.

I hereby certify that, in my opinion, a demurrer to the bill filed in the above-entitled cause is well founded in point of law.

JAMES P. ROOT,
Sol'r for Defendant & of Counsel.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

John W. Tappan, defendant in the above-entitled cause, being
20 sworn, says that the demurrer to the bill filed in said cause is not interposed for delay.

JNO. W. TAPPAN.

Subscribed & sworn before me this 30th day of November, 1872.
E. A. DRUMMOND,
U. S. Com'r.

(Endorsed:) Filed Nov. 30, 1872. W'm H. Bradley, cl'k.

Afterwards, to wit, on the 5th day of December, A. D. 1872, in the record of the proceedings of said court in chancery in said entitled cause appears the following entry, to wit:

THE MERCHANTS' NATIONAL BANK OF CHICAGO
v.
JOHN W. TAPPAN, COLLECTOR OF TAXES IN and for the town of South Chicago. } Chancery.

This cause, coming on to be heard upon the demurrer of the defendant, filed to the whole of the bill of complaint herein, and the parties being present by their respective counsel, and arguments being had, and the court, being now fully advised in the premises, holds said demurrer insufficient, and doth therefore order that the same be overruled.

21 To which the defendant, by his counsel, now and here excepts.

And therefore the defendant is ruled to plead to or answer said bill of complaint herein instanter; but the defendant declining and failing so to do or to ask time for that purpose, but electing to stand by his said demurrer, it is ordered by the court that said bill of complaint be, and the same is hereby, taken as confessed by said defendant.

Whereupon this cause coming on to be heard, without objection, upon the bill of complaint herein, taken as confessed by said defendant as aforesaid, and proofs and arguments of counsel, and the court being now fully advised in the premises finds the facts to be as stated in said bill of complaint, that the alleged assessment of taxes in said bill of complaint mentioned is void, and that the complainant is entitled to the relief prayed. And it is thereupon, on motion of Fuller & Smith, solicitors and of counsel of said complainant, considered, ordered, adjudged, and decreed by the court that the said alleged assessment of taxes for the year eighteen hundred and seventy-one, pretended to be levied against the shares of the capital stock of the complainant be, and the same is hereby, declared and adjudged to be void.

And it is further ordered, adjudged, and decreed, that the said

22 defendant be, and he is, and his successors in office are hereby, perpetually enjoined and restrained from collecting, or attempting to collect the said pretended assessment of taxes for the year eighteen hundred and seventy-one against the shares of the capital stock of the said complainant in said bill of complaint described, and from selling or attempting to sell said shares; and that the said complainant do have and recover of the said defendant its costs herein to be taxed.

To which decree the defendant now and here excepts, by his counsel, and prays an appeal therefrom to the Supreme Court, which is granted upon the defendant filing bond herein conditioned according to and within the time provided for by law in the penal sum of five hundred dollars, with good and sufficient security to be approved by the court.

23 Afterwards, to wit, on the 28th day of December, A. D. 1872, said defendant, by his solicitor, filed in said clerk's office his bond on appeal in said entitled cause; which said bond is in words and figures following, to wit:

Bond.

Know all men by these presents that we, John W. Tappan and Julian S. Rumsey, are held and firmly bound unto the Merchants' National Bank of Chicago, in the penal sum of five hundred dollars, good and lawful money of the United States, payment of which, well and truly to be made to the Merchants' National Bank and its assigns, we bind ourselves and our executors and administrators, firmly, jointly, and severally by these presents. Witness our hands and seals this 16th day of December, A. D. 1872.

The condition of the above obligation is such, that whereas, heretofore, to wit, on the third day of December, A. D. 1872, at the December term of the circuit court of the United States in and for the northern district of Illinois, by the order and determination of the court, a decree was entered in a case in chancery therein pending wherein the said Merchants' National Bank was complainant, and the said John W. Tappan was defendant, as collector of the town of South Chicago,
24 from collecting of or from said complainant the taxes charged against the shareholders in the said bank in and by the warrant in his hands, issued for that purpose, for the year 1871, from which decision and order of the court in allowing said decree defendant prayed an appeal to the Supreme Court of the United States, which appeal was allowed:

Now, therefore, if the said Tappan shall well and truly prosecute his said appeal, and shall pay all costs and damages that may be awarded against him in case the said decree should be affirmed, then this obligation to be void; otherwise to remain in full force and effect.

JNO. W. TAPPAN. [SEAL.]
J. S. RUMSEY. [SEAL.]

Approved—

H. W. BLODGETT, *Judge.*

(Endorsed:) Filed Dec. 28, 1872, W'm H. Bradley, cl'k.

25 NORTHERN DISTRICT OF ILLINOIS, *ss:*

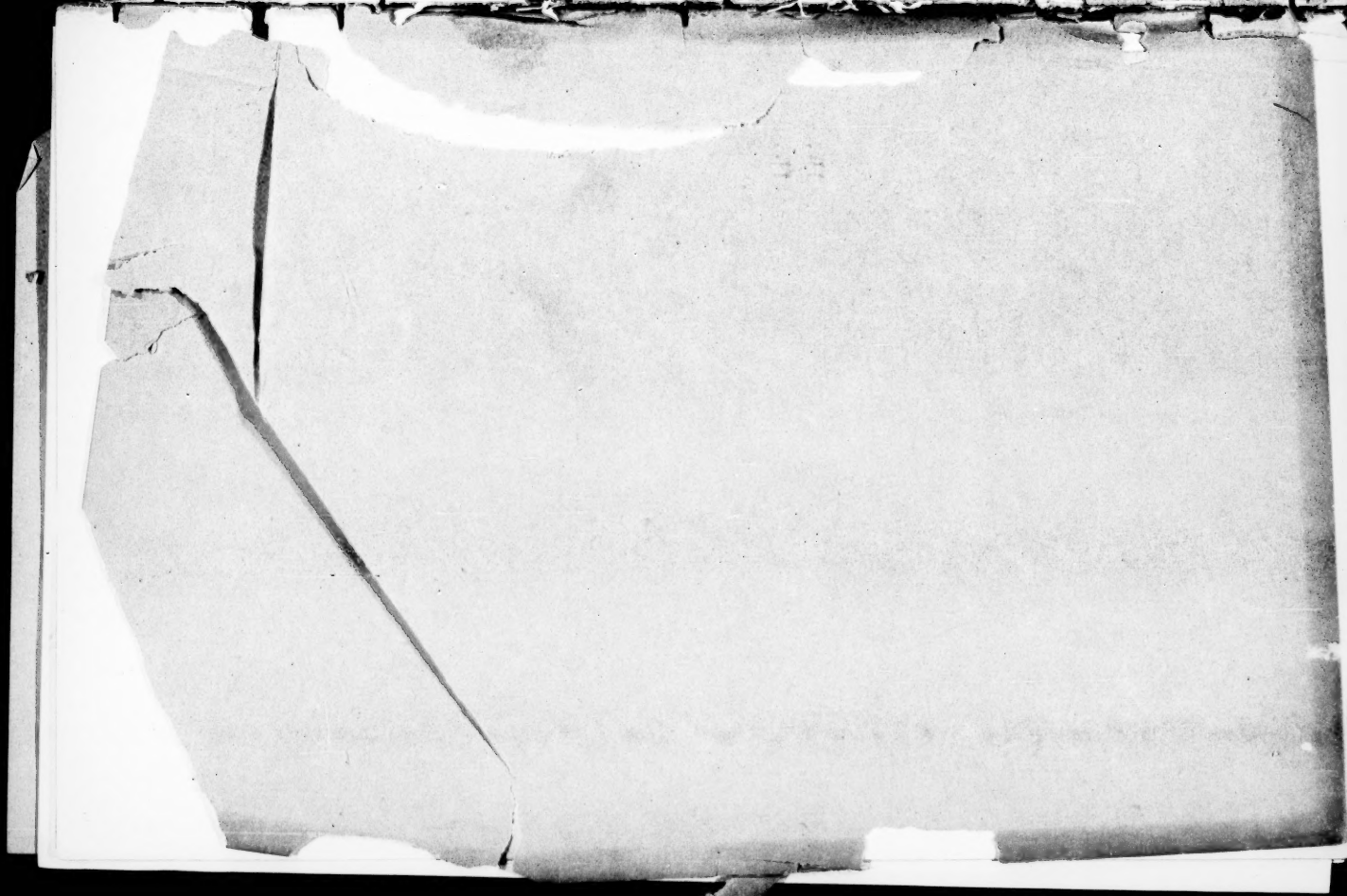
I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in chancery in said entitled cause, wherein the Merchants' National Bank of Chicago is complainant, and John W. Tappan collector, &c., is defendant, as appears from the records of said court in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court at my office, in Chicago, in said district, this 9th day of October, A. D. 1873, and of our Independence the 98th year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

(Indorsement on cover:) No. 567. John W. Tappan, collector of taxes, &c., Chicago, appellants, vs. The Merchants' National Bank of Chicago. N. Illinois C. C. U. S. Filed 16th October, 1873.

REC. 567—2



Supreme Court of the United States.

OF THE OCTOBER TERM, A. D. 1873.

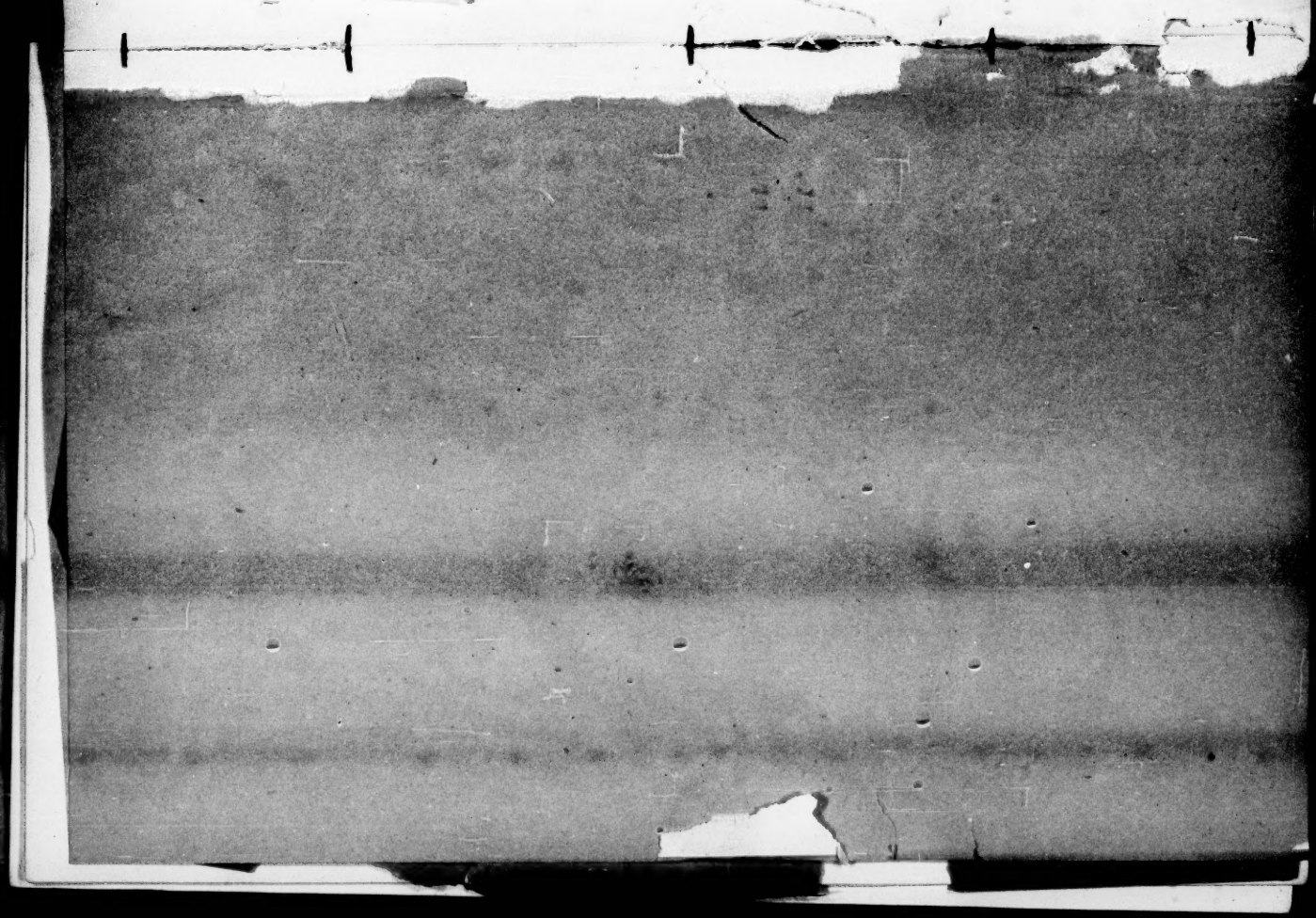
JOHN W. TAPPAN, Collector, *Appellant*,

vs.

THE MERCHANTS' NATIONAL BANK OF CHICAGO,
Appellee.

BRIEF FOR APPELLANT.

JAMES K. EDSALL,
Attorney General of Illinois,
For Appellant.



Supreme Court of the United States.

OF THE OCTOBER TERM, A. D. 1873.

JOHN W. TAPPAN, Collector of the Town of South Chicago, in Cook County and State of Illinois, *Appellant*,

vs.

THE MERCHANTS' NATIONAL BANK OF CHICAGO, *Appellee.*

STATEMENT OF THE CASE.

This was a bill in equity, exhibited by the appellee against appellant in the Circuit Court of the United States for the Northern District of Illinois, on the 30th day of November, 1872, to enjoin the collection of State, county and municipal taxes, levied under the laws of the State of Illinois, upon the shares of stock in the appellee's bank.

The bill of complaint states:

1. That the complainant (appellee) is a banking corporation created under and by virtue of the act of congress, approved June 3, 1864, known as the National Banking Act, located in the town of South Chicago, in the county of Cook and State of Illinois.

2. That the exhibit attached to the bill contains a full list of the owners and holders of the shares of the capital stock of complainant on the 1st day of April, 1871, with the place of

residence, and number of shares held by each shareholder; and that, as appears from said list, many of said shareholders do not reside in the State of Illinois, and many others who do reside therein, reside in school and park districts, towns and counties, other than the town of South Chicago, the South Park district, and the county of Cook, in the said State.

3. That there are national banks located and doing business in the said town of South Chicago, with many millions of capital stock, and that their stockholders to a large extent reside outside of the State of Illinois, and many reside in other towns and counties in the said State than the town of South Chicago and county of Cook; and that there are many national banks, with millions of capital stock, located in other parts of Illinois than the county of Cook, and that in nearly every instance many of the shareholders reside in other towns and counties than the town where such banks are respectively located.

4. That under and in accordance with the provisions of the act of the general assembly of the State of Illinois, entitled "An act to provide for the assessment and collection of taxes on the shares of capital stock in banks and banking associations," approved June 13, 1867, State, county, town and district taxes had been pretended to be levied upon all the shares of the capital stock of complainant, with reference to the ownership thereof on the 1st day of April, A. D. 1871, such taxes being at the rate of 26 mills upon the dollar of assessed value of said shares, which was fixed by the assessor of said town at the rate of the sum of something over one third the par value thereof, in accordance with the limit of valuation prevailing throughout said county.

5. That a warrant for the collection of said taxes had been issued and delivered to said Tappan, the collector of said town, and that said collector, under the authority of said warrant, had demanded of complainant the payment of said taxes, which amounted in the aggregate, on all the shares of said stock, to about the sum of $4005.64; and that the same be deducted from any dividend which may be declared on said capital stock, and threatens to sell said shares by virtue of said warrant, unless complainant complies with such request.

6. That in the assessment roll of personal property in said town of South Chicago for the year 1871, for which said taxes are levied, and also in said warrant, the names of the share-

holders of shares in the complainant's capital stock are stated, and separately opposite thereto, in appropriate columns, are also stated the residence of each shareholder, the number of shares held by each, and the assessed value thereof; and in said warrant the amount of tax levied on the shares of each shareholder is also stated opposite his, her or its name.

7. That said taxes are illegal and void, for the following reasons:

First—Because they are levied in the absence of said shareholders residing in places other than the said town of South Chicago, and no jurisdiction was ever obtained over them or of the shares held by them.

Second—Because the said act of June 13, 1867, in accordance with and under which said taxes were pretended to be levied, is void.

Third—Because they are contrary to the Constitution of the United States, and the said National Banking Acts, and the acts amendatory thereof.

Fourth—Because said act of June 13, 1867, is contrary to and in violation of the provisions of the Constitution of the State of Illinois, and therefore void; and for other good and sufficient reasons.

8. It is also averred that the shareholders in the complainant's corporation refuse to pay said taxes, and forbid the payment thereof by the complainant, and threaten a multiplicity of suits against complainant if it pays the same, or deducts the amount from any dividends upon said stock, and that if collected, irreparable damage will be done the stockholders; that the complainant is the trustee of the stockholders, and as such is entitled to protect their interests; that a sale of the shares of stock would prejudice the complainant in the public mind, etc.

The Exhibit attached to the Bill and referred to therein, shows that the whole number of the shares of stock taxed, was 4,500. That all of such shares except 290 were owned by various persons residing in the city of Chicago as follows: 4,010 shares thereof by various persons residing in the South Division, and 200 shares by persons residing in the West Division of said city, and that 290, the residue of such shares were owned by certain persons residing in the States of Indiana and Massachusetts.

The prayer of the bill is that said taxes may be cancelled and declared void and the collection thereof perpetually enjoined, and that the said Tappan and his successor in office be perpetually enjoined from any attempt to collect said taxes, and from selling, or attempting to sell, said shares or any of them therefor, and for general relief.

To this bill defendant below filed a demurrer for want of equity.

The circuit court overruled the demurrer, and entered a final decree perpetually enjoining the collection of said taxes in accordance with the prayer of the bill.

From this decree the defendant below appealed to this court.

ASSIGNMENT OF ERRORS.

The court below erred in overruling the demurrer to the bill, and in enjoining the collection of the taxes therein specified, because the averments of facts contained therein (as above set forth) are insufficient to entitle the complainant below to such relief.

BRIEF FOR APPELLANT.

I.

THE ASSESSMENT OF THE TAXES IN QUESTION UPON NON-RESIDENT AS WELL AS RESIDENT SHAREHOLDERS WAS FULLY AUTHORIZED BY BOTH FEDERAL AND STATE LEGISLATION.

The 40th section of the amended National Banking law of 1864, is as follows:

"And be it further enacted, that the president and cashier of every association, shall cause to be kept at all times, a full and correct list of the *names and residence* of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted; and such list shall be subject to the inspection of all the shareholders and creditors of the association, *and the officers authorized to assess taxes under State authority, during business hours of each day*, on which business may be legally transacted; and a copy of such list on the first Monday of July in each year, verified

by the oath of such president or cashier, shall be transmitted to the comptroller of the currency."

13 ~~12~~ Statutes at Large, 111.

The 41st section of the same act of 1864, after providing for the taxation of National Banks by the United States, concludes as follows: "*Provided:* That nothing in this act shall be construed to prevent all shares in any of said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes, imposed by or under State authority, at the place where such bank is located, AND NOT ELSEWHERE, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State: *Provided further*, That the tax so imposed, under the laws of any State, upon the shares of any of the associations authorized by this act, shall not exceed the rates imposed upon the shares in any of the banks organized under authority of the State where such association is located: *Provided also*, That nothing in this act shall exempt the real estate of associations, from either State, county or municipal taxes to the same extent, according to value, as other real estate is taxed."

Ibid. 112.

The act of Congress, passed and approved Feb. 10, 1868, provides: "That the words, place where the bank is located and not elsewhere," in section 41, of the act to provide a national currency, approved June 4th, 1864, shall be construed to mean the State within which the bank is located, and the legislature of each State may determine and direct, *the manner and place* of taxing all the shares of National Banks located within said State, subject to the restriction, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State. And provided always, that the shares of any National Bank owned by non-residents of any State, *shall be taxed in the city or town where said bank is located, and not elsewhere.*"

15 Statutes at Large (1868) page 34.

At the special session of the General Assembly of the State of Illinois, held in June, 1867, the act referred to in the bill was passed, entitled "An act to provide for the assessment

and collection of taxes on the shares of capital stock in banks and banking associations," approved June 13, 1867. The first five sections of this act are as follows:

"SECTION 1. Be it enacted by the People of the State of Illinois represented in the General Assembly: That hereafter no tax shall be assessed upon the capital of any bank or any banking association, organized under the authority of this State, or organized under the authority of the United States; and located within this State but the stockholders in such banks or banking associations, shall be assessed and taxed on the value of their shares of stock therein in the county, town or district, where such bank, or banking association is located, and not elsewhere, whether such stockholder reside in such town, county or district or not, but not at any greater rate than is or may be assessed upon other moneyed capital in the hands of individuals in this State. And in case any portion of the capital of such bank or banking association, is invested in real estate, then there shall be deducted in making the assessment of such shares, from the value of the same such sum as shall bear the same proportion to the value of such shares as the assessed value of all such real estate bears to the whole capital stock of such bank, or banking association. *Provided*, that nothing herein contained shall be held or construed to exempt from taxation the real estate held or owned by any such bank or banking association, but the same shall be subject to State, county, municipal and other taxation to the same extent and rates, and in the same manner as other real estate is or may be taxed.

§ 2. There shall be kept, at all times, in the office where the business of such bank or banking association, organized under the laws of this State, or of the United States, shall be transacted, a full and correct list of the names and residence of all the stockholders therein, and such list shall be subject to the inspection of the officers authorized to assess taxes or to assess property for taxation during the business hours of each day in which business may be legally transacted; and it shall be the duty of each county, town or district assessor, to ascertain and report to the county clerk of his county or other proper officer, as a part of his return of the assessment of property, a correct list of the names and residences of all stockholders in any such bank or banking association located in his county or town, with the number and value of all such

shares held by each of them respectively, showing the name of each of such banks or banking associations in which such shares are held, and such return shall also show what deduction if any, is to be made from the value of such shares on account of the investment of any of the capital stock of such bank or banking association in real estate, as set forth in the first section of this act.

§ 3. The county clerk, or other proper officer, to whom such returns are made, shall enter the valuation of all such shares in the tax list in the names of the respective owners of the same, and shall compute and extend taxes thereon the same as against the valuation of other moneyed capital, in accordance with the provisions of the first section of this act, and the several collectors of taxes shall have the same authority to collect the taxes so charged that they now have, or may hereafter have, for collecting other taxes. *Provided*, that in all cases where such shares are owned by persons or corporations not residing or located in the county, town or district, in which such bank or banking association is located, then the collector of such county, town, or district, shall have power and authority to collect such taxes in any county, town or district in this State, where such person or corporation may reside or be located.

§ 4. The collector of taxes and the officer or officers, authorized to receive taxes from the collector, may all, or either of them, have an action to collect the tax assessed on any share or shares of stock owned by non-residents of this State, from the avails of the sale of such share or shares, and the tax assessed against such share or shares, shall be and remain a lien thereon till the payment of said tax.

§ 5. For the purpose of collecting such taxes, and in addition to any other laws, not in conflict with the Constitution of the United States relative to the imposition of taxes, it shall be the duty of every such banker, banking association, and the managing officer or officers thereof to retain so much of any dividend or dividends belonging to such stockholders as shall be necessary to pay any taxes assessed in pursuance of this act, until it shall be made to appear to such officers that such taxes have been paid; and any officer of any such bank or banking association who shall pay over of any such dividend or dividends, or any portion thereof, contrary to the provisions of this

section, shall thereby become personally liable for all such tax. And if the said tax shall not be paid, the collector of tax where said bank is located, shall sell said share or shares to pay the same, like other property."

Session Laws 1867 (1st special session,) p. 6.
Gross' Statutes (edition of 1869), p. 618.

This is the act referred to in the bill of complaint, in pursuance of the provisions of which it is therein stated the taxes in question were levied.

The act appears to have been passed in order to bring the laws of Illinois relative to the taxation of shares of stock in national banks into harmony with the provisions of the national banking law on that subject, and in conformity to the opinion of this court, as held in

VanAllen *v.* The Commissioners, 3 Wal. 581;
Bradley *v.* The People, 4 Wal. 459.

That shares of stock in national banks are subject to taxation by or under State authority, at the same rate as other moneyed capital, has long since ceased to be a debatable question in this court.

It was competent to require the bank to pay the tax levied upon such shares of stock out of the dividends declared thereon.

National Bank *v.* Commonwealth, 9 Wal. 353.
Lionberger *v.* Rowse, id. 468—477.

II.

THE SITUS OF SHARES OF STOCK IN NATIONAL BANKS OWNED BY NON-RESIDENT AS WELL AS RESIDENT SHAREHOLDERS IS, FOR THE PURPOSES OF TAXATION, AT THE PLACE WHERE THE BANK IS LOCATED.

It appears from the bill that 290 of the shares of stock in the bank in question were owned by non-residents of the State, and that 200 of such shares were owned by persons residing in the West Division of the city of Chicago, and not in the South Division of said city or town of South Chicago, where the bank is located. It is claimed that as to such shares, the *situs* followed the persons of their owners, and that no jurisdiction existed for the purposes of taxation, either of the persons of the

shareholders, or of the subject matter of such shares in the town of South Chicago, where the taxes were assessed.

This argument seems to be based upon the general rule of the common law, that the *situs* of personal property follows the person of the owner, and that such property, if it is taxed at all, must be taxed at the domicile of the owner.

1. It is at least doubtful whether this rule ever had any just application to the shares of stock in incorporated companies, which for most purposes must be controlled by the *lex loci* of the corporation.

Wharton's Conflict of Laws, §§ 11 & 12.
Story's Conflict of Laws (7th ed.) §§ 364 & 384, and authorities cited in notes.

It is said that "shares of stock are *incorporeal* personal property, and as such are *incapable* of having any *situs*, save at the domicile of the owner." We ask, why is the *situs* necessarily at the domicile of the owner? The share has no tangible or physical existence there. The certificate, or paper evidence thereof, is not the share itself. The shares of stock can only be transferred upon the books of the corporation at the place where its business is carried on. These books are evidence of the ownership of the shares, and are kept in the place where the bank is located.

12 Statutes at Large, pp. 102, 112.

Moreover, the property of the bank is there situated, and it has no power to carry on business at any other place, except as incidental to its general business. Every thing which gives the share value is at, or immediately pertains, to the bank. It is true, the legal title to the property of the bank is vested in the corporation, and not in the shareholders personally. But the shareholders are the equitable owners of such property, after discharging the liabilities of the corporation. They have a pecuniary interest in the property of the bank which the courts will protect, and which is consequently subject to taxation.

People vs Commissioners, 4 Wal. 258.

In the case last cited, the Supreme Court of the United States, quoting from its opinion in *Van Allen v. The Assessors*, says:

"The interest of the shareholder entitles him to participate in the net profits earned by the bank, in the employment of its

capital, during the existence of its charter, in proportion to the number of his shares, and upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct, independent interest or property, held by the shareholders, like any other property that may belong to him; and we add, of course, is subject to like taxation."

Why may not this interest or property of the shareholder be declared by law to have its *situs* at the place where the subject matter thereof is, and be there subject to taxation?

2. The rule that the *situs* of personal property follows the person of the owner is itself a mere fiction of the common law, and is subject to modification by competent legislative authority.

Story's conflict of Laws, § 550.

Instead of being true as a legal proposition, that shares in National Banks, are incapable of having a *situs*, for the purpose of taxation at any other place than the domicile of the owner, it is true, under the present State and congressional legislation, that such shares are incapable of having such *situs* at any other place than where the bank is located.

This capacity or quality is stamped upon each share at its creation by the same law which gave it validity.

National Banks derive their existence from the acts of Congress we have quoted, which make provisions for the taxation of all shares therein, "by or under State authority," and that "each State may determine and direct the manner and PLACE of taxing *all* shares of National Banks located within said State" with the express injunction "*and provided always*, that the shares of any National Bank, owned by any non-resident of any State, SHALL be taxed in the city or town where said bank is located *and not elsewhere*."

These provisions, form a part of the organic law under which every such bank has its being, and by virtue of which its shareholders derive the benefit of thus investing their capital.

It would be strange indeed, if the thing thus created could successfully question the authority of the land that made it.

In support of the decision that State laws are not invalid which require National Banks to pay the taxes levied upon

shares of stock therein against the shareholder, this Court says:

"It has been the practice of many of the States for a long time to require of its corporations thus to pay the taxes levied on their shareholders. It is the common, if not the only mode, of doing this in all the New England States, and in several of them the portion of this tax which should properly go as the shareholders' contribution to local or municipal taxation is thus collected by the State, of the bank, and paid over to the local municipal authorities.

"*In the case of the shareholders not residing in the State, it is the only mode in which the State can reach the shares for taxation.*

"If the State cannot require of the bank to pay the tax on the shares of its stock, it must be because the Constitutiion of the United States or some act of Congress forbids it. There is certainly no express provision of the Constitution on the subject.

* * * * * * * *

"The mode under consideration is the one which Congress itself has adopted in collecting its tax on dividends, and on the increase arising from bonds of corporations. It is the only mode which, certainly without loss, secures the payment of the tax on all the shares, residents or non-residents; and, as we have already stated, it is the mode which experience has justified in the New England States as the most convenient and proper, in regard to the numerous wealthy corporations of those States. It is not to be readily inferred therefore that Congress intended to prohibit this mode of collecting a tax which they expressly permitted the State to levy."

National Bank v. Commonwealth 9. Wal. 353—361,363.

This reasoning necessarily assumes that shares owned by non-residents may be taxed at the place where the bank is established, and carries on its business.

Wherever the question has arisen, the State courts have uniformly held that the fact that the owners of the shares were non-residents of the State, afforded no ground of exemption from such taxation.

Whitney v. Ragsdale. 33 Indiana 107.

The State Farmers' National Bank, Pros. v. Cook, 32. N. J. (3 Vroom) 347.

Packard v Lewiston 5-5 Me 456

Dunn v Small 17 How Pr R 201 204

Providence Institution for Savings v. City of Boston 101 Mass. 575—581.

People v. Commissioners of Taxes 35 N. Y. 423—437.

The case last cited was affirmed in this court.

People v. Commissioners. 4 Wallace 244.

The question was fully considered by the Supreme Court of Illinois in the case of the First National Bank of Mendota v. Smith, Collector, &c., reported in 5 Chicago Legal News, p. 253—4, in which the law before cited was not only held valid under the Constitution of that State, but the right to impose taxes upon the shares in National Banks owned by non-residents was maintained in an opinion which we believe to be unanswerable.

The court says:

"We will now consider the validity of the argument urged in favor of the exemption of stockholders of such banks, located within this State, from State taxation under the act of 1867.

"The counsel for appellant cite as authority the case of the *Union National Bank* v. *The City of Chicago*, decided in 1871, in the Circuit Court of the United States for the Northern District of Illinois. We have been furnished with a copy of the opinion delivered in that case, and have given it a very careful examination. The same question now under consideration was presented there, and was decided adversely to the right of taxation, upon the same grounds which are urged by counsel for appellant in the case before us. While we have great respect for the learned district judge who decided that case, we find ourselves unable to concur either in his reasoning upon the question or the conclusion at which he arrived.

"In order that the position of the court in that case, and that of counsel for appellant in the case before us, may be fairly stated and understood, we quote the language of the court, whose reasoning the counsel for appellant adopt as the principal foundation for their argument.

"After giving the clauses of our State constitution of 1848, requiring uniformity in taxation, the opinion proceeds as follows:

'And by a series of adjudications of the Supreme Court of Illinois, it has become the settled law that these provisions are *restrictions* upon the power of taxation by the legislature, or any authority under it. All taxes therefore assessed by muni-

cipal corporate authorities must be proportionate and uniform within the jurisdiction of the body imposing them. Where there is jurisdiction neither of the persons nor property, the imposition of a tax would be ultra vires and void. Jurisdiction is as necessary to valid legislation, as to valid judicial action.

'Shares of stock are incorporeal personal property, and as such are held incapable of having any *situs*, save at the domicile of the owner. In the eye of the law they have in themselves no locality. They accompany the person of the owner where he goes, and he may deal with them and dispose of them according to the law of his domicile, which, if he dies intestate, governs their disposal. The act of June 13, 1867, directs taxes to be assessed by the authorities of counties, towns, cities and districts, upon the shares of these banks in the county or town where the bank is located, without regard to the residence of the owner or the *situs* of the shares; and in that respect I regard it as a violation of the constitution of the State. The complainants show, and it is not denied, that their shareholders are scattered over the State, and such taxation upon them appears to me a clear infringement of the constitutional requisition, that all assessments by the corporate authorities cities, etc., shall be uniform in respect to persons and property within their limits. This compels the taxation of the stock owned by residents of the State in the county, city, town or district where they reside, for the purpose of collecting county, city, town or district taxes; and a failure to do so destroyed the rule of uniformity with respect to property within the limits of the body imposing the taxes, while neither the persons nor property are within the jurisdiction of the taxing power at the place of the bank's location.

'If, then, this statute is void as to those who do *not* reside in the district where the bank is located, it must be as to those who *do;* because it would then be undeniable that every person would not be obliged to pay a tax in proportion to the value of his or her property, and the taxes for State purposes would not be levied with uniformity. And if the law be not valid as to shares of stock belonging to residents, the shares of non-residents can not be taxed; because the provisions of section 41 of the act of 1864 inhibit any tax upon non-residents that is not imposed upon residents of the State. And such a regulation would be in conflict with the federal constitution, which says:

'The citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States.' I cannot avoid the conclusion, that this law violates the imperative rule of the constitution.'

[Opinion of BLODGETT, Judge, in *National Bank* v. *City of Chicago*, 3 Chicago Legal News, 370.]

"There are two vital points involved in the foregoing reasoning and conclusion which will challenge serious attention. One is, in effect, that all shares of the stock of national banks in this State, though claiming and receiving the protection of our laws, and of our State and municipal governments, will wholly escape State, county, town or district taxation, if owned by non-residents of the State, and will be beyond the reach of any statute the Legislature can pass. Neither can they be taxed where the owner resides.

"They will escape taxation anywhere, although, by the act of congress under which these banks are located, there is a clear and manifest intention that stockholders should be subject to taxation in the State where the bank is located. The reasoning is, that they cannot be taxed in this *State* because by a mysterious and indissoluble tie, the *situs* of the shares is with the non-resident owners. They cannot be taxed where the owners live, because by the act of congress they can be taxed only *in the State* where the bank is located.

"The other point of this decision is, that if an assessor includes in his assessment certain property not legally subject to taxation, not only may the owner of such property enjoin the collection of the tax illegally imposed upon *that* property, but all other tax payers, though their taxes are thereby lessened in amount, may avail themselves of his grievances and enjoin the collection of taxes assessed upon their property; and this upon the theory that the addition to the assessment roll of property *not* subject to taxation violates the constitutional requirement of equality and uniformity. We are unable to understand how this conclusion is reached. When property subject to taxation is wholly left out of the assessment, it might be contended with much plausibility that uniformity was not attained. But even in that case, this court has held that the collection of the tax cannot be restrained by equity. Merritt *v.* Farris, 22 Ill. 511; Schofield *et al. v.* Watkins *et al.*, ib. 66.

"And again, in *Dunham et al.* v. *City of Chicago*, 55 Ill. 357, where the omission of the assessors to assess property subject to taxation, was set up as a defense to the application for judgment against delinquent lands, it was held by this court that such omission afforded no sufficient ground for declaring the taxes void. But whatever ground of complaint there might be on the part of owners of assessed property, because other property, liable to taxation, had been omitted from the assessment, and thus *increasing* their burdens, we are entirely unable to comprehend how tax-payers can complain because property *not* liable to taxation had been included. The result to them is simply that their taxes are thereby lessened, which is certainly a very novel reason for asking an injunction.

"The case in the United States Circuit Court, to which we have been cited, was a bill brought by the bank to restrain the collection of city taxes from any of the shareholders, whether resident or non-resident, in the city of Chicago. The shares of the residents were, even in the view of that court, properly taxable there. The shares of the non-residents were, in the view of the court, not within the city, but attached to the persons of their owners at the domiciles of the latter, and were therefore not taxable there. For aught that appeared there, all the property *in the city*, subject to taxation, was assessed. The addition to that assessment of property belonging to non-residents, and not within the city, according to the view of the court, may have been, if that view were correct, a wrong to the non-resident owners, but certainly was none to the resident tax-payers, and did not destroy either equality or uniformity of taxation as between them.

"We have commented at much length on this position of the Federal Court, because the same position is taken by the counsel in the case before us, on the authority of that decision, and the same relief is asked for the resident stockholders that was granted there.

"As is apparent in the extract from the opinion already given, the decision rests upon two propositions: First, that a tax cannot be assessed where there is no jurisdiction of either the person or the property. Second, the personal property has no *situs* of its own, but follows the person of its owner; and if this is not always true of tangible personal property, it is of incorporeal personal property, like shares of bank stock.

"The correctness of this proposition is not questioned. It is undoubtedly true that the legislature could not constitutionally authorize Cook county to levy a tax upon lands or other property having a fixed *situs* in LaSalle county.

"The second proposition is correct as a general rule of the common law. It is one of obvious convenience in determining what law shall govern in the distribution of estates of deceased persons. But while it is the rule of the common law, that is all that can be said of it. The fallacy of the reasoning of the federal court referred to, and of the counsel for the appellant, seems to be in assuming that the rule of the common law cannot be changed by statute. The Legislature, by the act of 1867, certainly intended to change it in regard to bank shares, and to fix their *situs*, for all purposes of taxation, in the county where the bank is situated. The language employed is broad enough to effect the change, and it has been made if the Legislature had the constitutional power to make it. Where is the constitutional provision which prohibits the change? We have been referred to none; and in what provision lurks the prohibition, we confess ourselves at a loss to conjecture. That the decision of the federal court assumes, and is based upon the theory, that the *situs* of the share is inseparable, even by statute, from the person of the owner, is undeniable. Yet we are pointed to no provision of the constitution prohibiting what would seem to be an exercise of one of the plainest and simplest of legislative powers. That the Legislature can change the rule of the common law in this respect, seems to us a proposition too plain for argument; and if the power had not been practically denied by a court of such respectability, we should deem it so palpably clear as not to admit of controversy.

"Story, in his Conflict of Laws, sec. 550, speaking of this question of *situs*, thus:

'The general doctrine is not controverted that, although movables are for many purposes to be deemed to have no *situs*, except that of the domicile of the owner, yet this being but a *legal fiction*, it yields whenever it is necessary, for the purpose of justice, that the actual *situs* of the thing should be examined.'

"The separation of the *situs* of personal property from the domicile of the owners, for the purposes of taxation, is familiar

doctrine in the courts of this country, and has been sustained by this court in various cases. In *Wilkey v. The City of Pekin*, 19 Ill. 160, it was held that a resident of that city could not, under the charter, be taxed on personal property not having its actual *situs* within the city. The *situs* of the property was held under the charter not to attach to the person of the owner. In *Mills v. Thornton*, 26 Ill. 300, a like severance of the *situs* from the person, for the purposes of taxation, was again recognized. In the *City of Dunleith v. Reynolds*, 53 Ill. 45, the court held certain personal property, within the city, subject to taxation, although the owner resided elsewhere."

'Certificate of stock,' says Comstock J. in Mechanics' Bank v. N. York N. & H. R. R. Co., 3 Kern 627, 'are not securities for money in any sense, much less are they negotiable securities. They are simply the muniments and evidences of the holder's title to a given share in the property and franchises of the corporation, of which he is a member.' Under this view of the law it would seem to be eminently proper for the legislature to fix the *situs* of property so anomalous in nature, for the purposes of taxation. The question, however, is not whether the act of 1867, under which these taxes were levied, was just or reasonable, but simply whether it was within the limits of legislative power. If it was not, then there is no power in our legislature to change any artificial rule of the common law, and many of the acts within our statute books are void for the same reason.

"But in our opinion the act of 1867 was not only constitutional, but was also a very proper and even necessary exercise of legislative power. It places the *situs* of bank shares where, from the very nature of the property, it ought to be placed, for the purpose of taxation. The act of Congress itself contemplates a severance of the *situs* of such shares from the person of the owner, by providing that they should not be taxed except in the State where the bank is established. But apart from this, it is really much more reasonable to fix the *situs* of shares at the place where the bank is located, and where it must continue to do its business, or wind up its affairs, than to separate, by legislation, tangible personal property from the person of its owner. The latter may be in one county to-day, and in another to-morrow. Its actual *situs* is liable to con-

stant change; and the title may be transferred by the owner wherever he may be. But not so with bank shares. The banking corporation has a fixed locality where it must transact business, and there wind up its affairs when it ceases to exist. It is the trustee of the stockholders who must come to its counter for their annual dividends, and their share of assets on final liquidation. Its debts are payable at its counter, and credits receivable there. No transfer of stock can be completed unless shown upon the books of the bank. A list of the names and residences of all the stockholders must be there kept. The property, in its own nature, possesses much more of the immobility of real estate than any other personal property which we can now call to mind. The legislature, then, did no violence to the nature of the property when it fixed the *situs* of the shares at the locality of the bank. We have seen that the exercise of the power, by the legislature, was both proper and legitimate. It was necessary, because if this act had not been passed, much of the bank stock in the State would have soon escaped taxation by modes so obvious as to need no specification. As it is, this is impossible. The assessor of each county knows every bank in the county, and has but go to the books to ascertain the ownership of the shares. The act, instead of defeating uniformity and equality of taxation, which is the theory upon which its invalidity is asserted, does, in our judgment, tend to secure these results more effectually than any other method that could have been adopted.

"This question has been before the highest courts of New York and New Jersey, and they have decided as we do.

"National Bank v. Cook, 3 Vroom. 347. The People v. Commissioners of Taxes, 35 New York, 413.

"We know of no authority that can be cited in support of the ruling of the circuit court of the United States for the Northern District of Illinois, to which we have already sufficiently adverted. The case just cited from 35 New York, in which this point was expressly ruled, was afterwards carried to the Supreme Court of the United States. This point was not deemed of sufficient importance to be raised before this court, and the judgment of the court of appeals of New York was affirmed there, without reference by the court to the question. 4th Wallace. 244.

"We cannot regard the attempt of the National Bank to shield their stockholders from all State taxation, as at all meritorious. They offer no grounds for the alleged exemption which we can regard as even plausible.

"Although their franchises are conferred by act of Congress, still all their business, so far as conducted with reference to profit, is done under our State laws, the same as corporations created by the laws of this State. It is by the laws of the State that their business transactions are governed, and by the same laws that their property is protected. So that they are under the same duty to contribute to the support of the State and municipal governments as any natural person or State corporation may be. Unless exempted by some plain rule of law, they should not ask a court of equity to relieve their stockholders from that duty."

First National Bank of Mendota *v.* Smith, 5 Chicago Legal News 253.

This case is not as yet reported in the regular series of the Illinois Reports, but we file herewith pamphlet copies thereof for more convenient reference by this court.

III.

THE ACT UNDER WHICH THE TAXES IN QUESTION WERE LEVIED IS NOT IN CONFLICT WITH THE CONSTITUTION OF ILLINOIS.

Upon this question the decision of the Supreme Court of Illinois in *First National Bank of Mendota v. Smith, supra*, and other cases holding the act to be constitutional, must be received as conclusive authority.

McVeagh v. City of Chicago, 49 Ill. 310.

In the construction of the statutes and Constitution of a State the Federal Courts are governed by the decisions of the State courts.

Leffingwell vs. Warren, 2 Black 599.
Suydam vs. Williamson, 24 Howard, 427.
McKeon vs. Delaney's Lessee, 5 Cranch, 22.
Luther vs. Borden, 7 Howard, 1.
Nathan vs. Sheldon, Ib. 812.
Massingill vs. Down, Ib. 767.
Van Ransellear vs. Kearney, 11 Howard, 297.
Webster vs. Cooper, 14 Howard, 514.

The only recognized exception to this rule is, where the State court has, by subsequent decisions, changed its former rulings, and in the *interim* rights have accrued in reliance upon such former decisions, which it would be in bad faith to hold void under the more recent decisions.

Gelpck vs. City of Dubuque, 1 Wal., 175.

Havemeyer vs. Iowa County, 3 Wal., 294.

Lee County vs. Rogers, 7 Wal., 294.

The City vs. Lawson, 9 Wal., 477.

Were it conceded that the shares owned by non-residents could not be taxed in this State, the argument that in order to secure uniformity of taxation under the Constitution of Illinois the shares owned by the residents must in like manner be exempt, needs no further refutation than is contained in the opinion in the case of *First National Bank of Mendota v. Smith supra.* The premises upon which that argument is based, assume that the *situs* of the shares owned by non-residents is not within this State.

It is not claimed that the Constitution of a State has any extra territorial operation. It would be absurd to so construe the Constitution of Illinois as to exempt from taxation property within the State, because other property of a like character, not within the jurisdiction of the State, is thus exempt. To sustain the decree of the court below, and the argument upon which it is based, involves this absurdity. The bill, taken in connection with the exhibit made a part thereof, shows that only 290 shares in appellee's bank were owned by non-residents of the State, and 200 shares by persons residing outside the town of South Chicago, but within the city of Chicago; and the residue 4010 shares by persons residing within that town.

And the tax imposed upon *all* the shares is perpetually enjoined, under the pretext of complying with the Constitution of Illinois which declares that "every person and corporation shall pay a tax in proportion to the value of his, her, or its property."

To maintain the proposition that this clause of the Illinois Constitution embraces the shares owned by non-residents,

counsel for appellee must abandon their leading point, that the *situs* of such shares is at the owner's domicile, and this is a surrender of their entire case.

IV.

THE ACT IN QUESTION IS ALSO IN CONFORMITY TO THE PROVISIONS OF THE NATIONAL BANKING LAW, IN RESPECT TO THE TAXATION OF SHARES IN NATIONAL BANKS BY OR UNDER STATE AUTHORITY.

The only objection urged against the act in this particular so far as we are advised, is, that it is said to require the tax to be levied upon the *shareholders* personally, and not upon the *shares*. It is said that if the shareholder is a non-resident, no jurisdiction of his person can be acquired, and no tax can be levied against him personally; and that conceding the *situs* of the shares to be within the jurisdiction of the authorities imposing the tax, the tax must be imposed upon the shares and not upon the person of their owner.

With due deference to the learned counsel who have advanced this argument, we submit that it is extremely hypercritical. Possibly the framers of the act in question did not have in their minds distinctions so exquisitely nice. It is true the first section of the act provides that "the stockholders in such banks or banking associations, shall be assessed and taxed on the value of their shares of stock therein."

The fourth section, however, speaks of the "tax assessed on any share or shares of stock owned by non-residents," &c., and the provisions of the entire act for the collection of the tax, so far, at least, as non-residents are concerned, provides a remedy in the nature of a proceeding *in rem* against the share itself, rather than a proceeding *in personam* against the shareholder.

The court will regard the substance of the law, which, manifestly is, that the shares shall be taxed.

When the counsel for complainant framed their bill in this case, they must have understood the act as requiring the tax to be levied "upon the shares," etc., for they therein state "That, under and *in accordance with* the provisions of the act

of Said State, entitled "An act to provide for the assessment and collection of taxes on banking associations," approved June 13, 1867, State, county and district taxes, for the year 1871, have been lately pretended to be levied *upon the shares of the capital stock* of your orator, with reference to the value and ownership thereof on the first day of April, A. D., 1871, such taxes being at the rate of twenty-six mills upon the dollar on the assessed value of said shares, which was fixed by the assessor of said town, at the sum of something over one-third the par value thereof, in accordance with the limit of valuation prevailing throughout said county."

If the General Assembly of Illinois erred at all in this particular, the error consisted in the adoption of the exact phraseology of the New York statute as quoted in *People v. The Commissioners* 4, Wallace 245, which had received the judicial approval of the highest appellate court of that State, as well as that of the Supreme Court of the United States in the case last cited.

The first section of the New York statute passed April 23, 1866, also provides that:

"No tax shall hereafter be assessed upon the capital of any bank or banking association organized under the authority of this State or of the United States; but the stockholders in such banks or banking associations shall be assessed and taxed on the value of their shares of stock therein," etc.

People vs. Commissioners, 4 Wallace, 245.

It ought to be safe to follow such a precedent when so approved.

Under the Constitution of Illinois, all taxation is based upon the valuation of property, except as to corporations and persons using franchises, and persons following certain specified callings, and as to these it may be in such other manner as the General Assembly shall provide by general laws uniform as to each class upon which the same operate.

Article 9. § 1.

Under the laws of Illinois, and it is believed to be equally true of every State in the Union, the lands and other property of non-residents having its actual *situs* in such States, respectively, is subject to taxation therein, in the same manner as the property of residents. Would any court hold that, in order to sustain the validity of such laws providing equally

for the taxation of the property of residents and non-residents, it was necessary to say in terms that the tax must be assessed against the property and not against the owner thereof, in respect to such property? Should it be so held, the revenue laws of but few of the States can be upheld as to non-residents, for, as a rule, the same law which provides for the assessment of their property also embraces that owned by residents and provides for such assessment against the owner.

Another instance may be given. Foreign attachment is a familiar proceeding in the jurisprudence of the respective States.

Where no personal service of process is obtained, the defendant not being within the jurisdiction of the Court, no valid judgment *in personam* can be recovered against him; but if the property attached is within the jurisdiction, a judgment may be rendered upon which such property may be legally sold. The whole proceeding is carried on and the judgment rendered in the same form, except as to the order for execution, as if the judgment was *in personam*.

The personal name of the defendant is used as the defendant, and not a description of the *res* or property attached as in admiralty proceedings. Yet such judgments are held valid as in the nature of judgments *in rem*, although the Court acquired no jurisdiction of the person of the owner of the property who is named as defendant in the proceeding.

If the personal name of the owner of property may be thus used in a proceeding by foreign attachment, why may not the name of a non-resident shareholder in like manner be used in proceedings for the assessment and collection of taxes upon his shares, the *situs* of which is within the jurisdiction of the taxing power?

Foreign attachment is, in reality, a proceeding against the property attached, and not a personal proceeding against its owner.

So the taxation of such property is, in substance, a proceeding against the property taxed, and not against the owner, although, as a matter of convenience, his name is used in connection therewith. As jurisdiction of the property attached confers jurisdiction upon the Court in one case, so jurisdiction of the property taxed confers jurisdiction upon the taxing power in the other.

V.

TAXES LEVIED BY THE SUBORDINATE MUNICIPAL INCORPORATIONS OF THE STATE, ARE "IMPOSED BY OR UNDER STATE AUTHORITY," WITHIN THE PURVIEW OF THE NATIONAL BANKING ACT.

The objection has been raised that the act of Congress, in question, only permits the imposition of taxes for strictly State purposes, as distinguished from those levied by its subordinate municipal corporations. The very language of the act we have quoted, shows that the objection is untenable.

Taxes levied by the subordinate municipal corporations of a State, in pursuance of its Constitution and laws, such as counties, cities and towns, are taxes "imposed by or *under* State authority," within the meaning of the act of Congress, and are as valid as if imposed directly by the State. Such corporations, are the mere auxiliaries of the State government, derive all their powers from its Constitution and laws, and may be created, modified or abolished at its pleasure, and are only organized to enable the State more conveniently and efficiently to administer its internal police.

Cooley's Constitutional Limitations, 132.

If the State saw fit to abolish such municipal subdivisions it would be compelled to resume the burden of discharging the functions it has wisely confided to these local governmental agencies, and increase its own revenues to an amount sufficient to meet the liabilities now discharged by local taxation.

The true intent of the congressional legislation upon this question is, that for the purpose of taxation, shares in National Banking Associations shall be placed upon an equality with other moneyed capital in the respective States.

No discrimination is required in favor of such shares, nor is any permitted against this class of property.

It should be observed, that many of the cases where the taxation of the shares in National Banks has been sustained, were cases in which the taxes were assessed by and for the benefit of municipal corporations subordinate to the State, and organized under its laws.

Packard vs. Lewiston, 55 Maine 456.

Austin vs. Alderman of Boston, 14 Allen 359.

Providence Inst. for Savings vs. Boston, 101 Mass. 575.

McVeagh vs. City of Chicago, 49 Ill. 318.

But where a city attempts to tax the capital or business of the corporation and not the shares of its shareholders, it will be held in violation of the act of Congress in that behalf, in like manner as if the State directly assessed such taxes.

City of Pittsburg vs First National Bank, 55 Penn. State Rep. 45.

People vs. Bradley, 4 Wal. 459.

It is respectfully submitted, that an interpretation of the law can not be sound, which disregards both State and Federal legislation, as well as the judgments of the highest State and Federal courts, so far as the same have been pronounced upon the question; and permits the owners of shares in banking associations, to enjoy all the benefits conferred by the law, under which the banks are organized, as well as the protection of the State laws where their business is transacted, and at the same time enables them to escape the just and equal burdens of taxation, imposed upon them in common with other citizens; and thus set at naught the very laws without which, their banks cannot exist for a day.

JAMES K. EDSALL,
Attorney General of Illinois
For Appellant.

John H. Tappan
v
Merchants National Bank
of Chicago

OPINION

OF THE

SUPREME COURT OF ILLINOIS

ON THE

TAXATION OF THE

SHARES OF STOCK

OF

NATIONAL BANKS.

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SUPREME COURT OF ILLINOIS.

CENTRAL GRAND DIVISION.

JANUARY TERM, A. D. 1873.

FIRST NATIONAL BANK OF MENDOTA

v.

SMITH, COLLECTOR, &c.

Mr. JUSTICE MCALLISTER delivered the opinion in this case.

This was a bill in equity, exhibited in the circuit court of Lasalle county, by the First National Bank of Mendota, against the tax collector of the township of Mendota, in which the bank was situated, to restrain the collection of the taxes assessed for the year 1871 against the stockholders of the bank upon their respective shares of stock. The defendant demurred to the bill. The court sustained the demurrer, and no amendment of the bill being proposed, it was dismissed. The complainant appealed to this court.

The ground upon which the bill seeks to restrain the collection of these taxes, is, that the taxes are levied in Lasalle county, against all the shareholders, while only a part of them reside in that county, and the others reside in Bureau county. The position taken is, that there is no power to levy the tax against the shareholders residing in Bureau county, because their shares must be considered as having their *situs* only in the county where the holders reside. Therefore the taxes, as respected all that class, were illegal and void; and being illegal and void as to them, they were, likewise, as to stockholders residing in the county where the bank is located, by the operation of the rule of the constitution requiring uniformity. For these reasons and because the bank is trustee of all the stockholders, it is insisted, that upon the ground of avoiding multiplicity of suits, the bill can be maintained by the bank.

The propositions upon which this bill is based, when specifically stated, are briefly these: First, That in order to a valid tax the Legislature must have power or jurisdiction over the person or property in the county where the tax is authorized to be levied. Second, That, inasmuch as a portion of the owners resided out of the county, though in the State, and the *situs* of their shares was at their domicil, the Legislature was powerless to change that *situs*; so that there could be no jurisdiction of either the person or property in the county of the bank, and therefore, as to all that class of owners, the tax was void. And, lastly, inasmuch as the tax was void in respect to owners of shares who did *not* reside in Lasalle county, the tax was, likewise, under the constitutional rule of the State requiring uniformity and equality, void in respect to those who *did* reside in that county.

The 41st section of the act of Congress, passed in 1864, expressly recognizes the right of the States to tax all shares in the stock of national banks. Notwithstanding this recognition the right was soon denied by the banks; and the question first came before this court in the case of the *People* v. *Bradley*, 39 Ill. 130. It was there held that the stock was taxable, as had previously been held by the Court of Appeals in the cases of the *City of Utica* v. *Churchill* and *Van Allen* v. *Supervisors*, 33 N. Y. 162.

In Bradley's case, as in the New York cases, the tax was levied upon the capital stock of the bank in the aggregate and not upon the individual shareholders. These cases were taken to the Supreme Court of the United States and reversed upon the sole ground that the tax must, under the act of Congress, be levied upon the individual shareholder. 3 Wallace, 572, 4 ib. 459. In this mode it was held that the shares could be taxed.

In obedience to this decision of that court, our Legislature, in 1867, passed an act requiring the taxes to be assessed upon the individual shareholders "in the county, town or district where such bank or banking association is located, and not elsewhere, whether such stockholders reside in such county, town, or district, or not."

Having successfully resisted the attempt to tax the stock of the

bank as a corporation, as appears by the cases referred to, it is now sought to prevent taxation of the stockholders upon their shares. This language is considerately employed, and it is believed to be not too broad; because, as will be presently seen, if the grounds now taken on behalf of the stockholders are maintained, it will only be necessary that the stocks of the various national banks in the State, shall be held in the names of non-residents, in order to withdraw the shares altogether from the reach of State legislation for taxation.

Before proceeding further in this case, it should be observed, that the question involved depends entirely upon the laws of this State, and is in no manner embarrassed by any act of Congress.

The 41st section of the act of Congress above referred to, under which these banks are organized, required State taxes to be imposed "at the place where the bank is located and not elsewhere." But by an act of February, 1868, Congress declared these words—"place where such bank is located, etc.," to mean, "the *State in which* the bank is located and not elsewhere."

This provision places the shares in such banks under the taxing power of the State wherein the bank is located, and prohibits their being subject to State taxation elsewhere.

This limitation, with the further ones, that taxation imposed should not be at a greater rate than upon other moneyed capital in the hands of individual citizens of the State where made; and that the tax so imposed under the laws of any State upon the shares of the association authorized by that act, should not exceed the rate imposed upon the shares of any of the banks, organized under the authority of the State where such association is located, constitute the only limitations by Congress on the taxing power of the State where the bank is located; none of which have any application to this case. Our Legislature was, therefore, left at liberty to impose the same tax upon the value of shares in national banks located here, which it could upon any other moneyed capital of our citizens, and fix the *situs* of such shares in its discretion, unless restrained by our own constitution.

We have made this reference to the acts of Congress in order to show that the questions involved depended solely upon the laws of this State, and are in no respect embarrassed by any laws of Congress.

We will now consider the validity of the argument urged in favor of the exemption of stockholders of such banks, located within this State, from State taxation under the act of 1867.

The counsel for appellant cite as authority the case of the *Union National Bank* v. *The City of Chicago*, decided in 1871 in the circuit court of the United States for the Northern District of Illinois. We have been furnished with a copy of the opinion delivered in that case, and have given it a very careful examination. The same question now under consideration, was presented there; and was decided adversely to the right of taxation upon the same grounds which are urged by counsel for appellant in the case before us. While we have great respect for the learned District Judge who decided that case, we find ourselves unable to concur either in his reasoning upon the question or the conclusion at which he arrived.

In order that the position of the court in that case, and that of the counsel for appellant in the case before us, may be fairly stated and understood, we quote the language of the court, whose reasoning the counsel for appellant adopt, as the principal foundation for their argument.

After giving the clauses of our State constitution of 1848, requiring uniformity in taxation, the opinion proceeds as follows:

"And by a series of adjudications of the Supreme Court of Illinois, it has become settled law that these provisions are *restrictions* upon the power of taxation by the Legislature, or any authority under it. All taxes therefore assessed by municipal corporate authorities must be proportionate and uniform within the jurisdiction of the body imposing them. Where there is jurisdiction neither of the persons nor property, the imposition of a tax would be ultra vires and void. Jurisdiction is as necessary to valid legislative, as to valid judicial action.

Shares of stock are incorporeal personal property, and as such are held incapable of having any situs, save at the domicil of the owner.

In the eye of the law they have in themselves no locality. They accompany the person of the owner where he goes and he may deal with them and dispose of them according to the law of his domicil, which, if he dies intestate, governs their disposal. The act of June 13, 1867, directs taxes to be assessed by the authorities of counties, towns, cities and districts, upon the shares of these banks in the county or town where the bank is located, without regard to the residence of the owner or the *situs* of the shares; and in that respect I regard it as a violation of the constitution of the State. The complainants show, and it is not denied, that their shareholders are scattered over the State, and each taxation upon them appears to me a clear infringement of the constitutional requisition, that all assessments by the corporate authorities of cities, etc., shall be uniform in respect to persons and property within their limits. This compels the taxation of the stock owned by residents of the State in the county, city, town or district where they reside, for the purpose of collecting county, city, town, or district taxes; and a failure to do so destroyed the rule of uniformity with respect to property within the limits of the body imposing the taxes, while neither the persons nor property are within the jurisdiction of the taxing power at the place of the bank's location.

If then this statute is void as to those who do *not* reside in the district where the bank is located, it must be as to those who *do*; because it would then be undeniable that every person would not be obliged to pay a tax in proportion to the value of his or her property, and the taxes for State purposes would not be levied with uniformity. And if the law be not valid as to shares of stock belonging to residents, the shares of non-residents can not be taxed; because the provisions of section 41 of the act of 1864 inhibit any tax upon non-residents that is not imposed upon residents of the State. And such a regulation would be in conflict with the federal constitution, which says, "The citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States." I cannot avoid the conclusion that this law violates the imperative rule of the constitution."

There are two vital points involved in the foregoing reasoning and

conclusion which challenge serious attention. One is, in effect, that all shares in the stock of national banks in this State, though claiming and receiving the protection of our laws, and of our State and municipal governments, will wholly escape State, county, town or district taxation, if owned by non-residents of the State, and will be beyond the reach of any statute the Legislgture can pass. Neither can they be taxed where the owner resides.

They will escape taxation any where, although, by the act of Congress under which these banks are located, there is a clear and manifest intention that stockholders should be subject to taxation in the State where the bank is located. The reasoning is, that they cannot be taxed in this *State* because by a mysterious and indissoluble tie, the situs of the shares is with the non-resident owners. They cannot be taxed where the owners live, because by the act of Congress they can be taxed only *in the State* where the bank is located.

The other point of this decision is, that if an assessor includes in his assessment certain property not legally subject to taxation, not only may the owner of such property enjoin the collection of the tax illegally imposed upon *that* property, but all other tax payers, though their taxes are thereby lessened in amount, may avail themselves of his grievances and enjoin the collection of taxes assessed upon their property; and this upon the theory that the addition to the assessment roll of property *not* subject to taxation violates the constitutional requirement of equality and uniformity. We are unable to understand how this conclusion is reached. When property subject to taxation is wholly left out of the assessment, it might be contended with much plausibility that uniformity was not attained. But even in that case, this court has held that the collection of the tax cannot be restrained by equity. Merritt v. Farris, 22 Ill. 511. Schofield *et al.* v. Watkins *et al.*, Ib. 66.

And again, in *Dunham et al.* vs. *City of Chicago*, 55 Ill. 357, where the omission of the assessors to assess property subject to taxation, was set up as a defense to the application for judgment against delinquent lands, it was held by this court that such omission afforded no

sufficient ground for declaring the taxes void. But whatever ground of complaint there might be on the part of owners of assessed property, because other property, liable to taxation, had been omitted from the assessment, and thus *increasing* their burdens, we are entirely unable to comprehend how tax-payers can complain because property *not* liable to taxation had been included. The result to them is simply that their taxes are thereby lessened, which is certainly a very novel reason for asking an injunction.

The case in the United States Circuit Court, to which we have been cited, was a bill brought by the bank to restrain the collection of city taxes from any of the shareholders, whether resident or non-resident, in the city of Chicago. The shares of the residents were, even in the view of that court, properly taxable there. The shares of the non-residents were, in the view of the court, not within the city, but attached to the persons of their owners at the domicils of the latter, and were therefore not taxable there. For aught that appeared there, all the property *in the city*, subject to taxation, was assessed. The addition to that assessment of property belonging to non-residents, and not within the city, according to the view of the court, may have been, if that view were correct, a wrong to the non-resident owners, but certainly was none to the resident tax-payers, and did not destroy either equality or uniformity of taxation as between them.

We have commented at such length on this position of the federal court, because the same position is taken by counsel in the case before us, on the authority of that decision, and the same relief is asked for the resident stockholders that was granted there.

As is apparent in the extract from the opinion already given, the decision rests upon two propositions: First, that a tax cannot be assessed where there is no jurisdiction of either the person or the property. Second, that personal property has no *situs* of its own, but follows the person of its owner; and if this is not always true of tangible personal property, it is of incorporeal personal property, like shares of bank stock.

The correctness of the first proposition is not questioned. It is

undoubtedly true that the legislature could not constitutionally authorize Cook county to levy a tax upon lands or other property having a fixed *situs* in LaSalle county.

The second proposition is correct as a general rule of the common law. It is one of obvious convenience in determining what law shall govern in the distribution of estates of deceased persons. But while it is a rule of the common law, that is all that can be said of it. The fallacy of the reasoning of the federal court referred to, and of the counsel for the appellant, seems to be in assuming that this rule of the common law cannot be changed by statute. The legislature, by the act of 1867, certainly intended to change it in regard to bank shares, and to fix their *situs*, for all purposes of taxation, in the county where the bank is situated. The language employed is broad enough to effect the change, and it has been made if the legislature had the constitutional power to make it. Where is the constitutional provision which prohibits the change? We have been referred to none; and in what provision lurks the prohibition, we confess ourselves at a loss to conjecture. That the decision of the federal conrt assumes, and is based upon the theory, that the *situs* of the shares is inseparable, even by statute, from the person of the owner, is undeniable. Yet we are pointed to no provision of the constitution prohibiting what would seem to be an exercise of one of the plainest and simplest of legislative powers. That the legislature can change the rule of the common law in tnis respect, seems to us a proposition too plain for argument; and if the power had not been practically denied by a court of such respectability, we should deem it so palpably clear as not to admit of controversy.

Story, in his Conflict of Laws, sec. 550, speaking of this question of *situs*, says:

"The general doctrine is not controverted that, although moveables are for many purposes to be deemed to have no *situs*, except that of the domicil of the owner, yet this being but a *legal fiction*, it yields whenever it is necessary, for the purposes of justice, that the actual *situs* of the thing should be examined."

The separation of the *situs* of personal property from the domicil of

the owner, for the purposes of taxation, is familiar doctrine in the courts of this country, and has been sustained by this court in various cases. In *Wilkey* v. *The City of Pekin*, 19 Ill. 160, it was held that a resident of that city could not, under the charter, be taxed on personal property not having its actual *situs* within the city. The *situs* of the property was held under the charter not to attach to the person of the owner. In *Mills* v. *Thornton*, 26 Ill. 300, a like severance of the *situs* from the person, for the purposes of taxation, was again recognized. In the *City of Dunleith* v. *Reynold*, 53 Ill. 45, the court held certain personal property, within the city, subject to taxation, although the owners resided elsewhere.

These, it is true, were cases of tangible property. But in the *Board of Supervisors* v. *Davenport*, 40 Ill. 198, the same principle was applied to property not tangible. It was there held, that money belonging to a resident of New York, and sent to an agent in Tazewel county to be loaned, was taxable by the county. The property was a mere chose in action, but the *situs* was, by the terms of the revenue law, severed from the owner and attached to the agent in this State who loaned the money. It might be said in reference to the latter case, that the possession of the agent was that of the principal. If this be conceded, it may also be said that the bank files this bill as trustee of the stockholders; and as such, possesses the lawful control over the rights and interests of the cestuis qui trust, much greater than that of a mere agent for the loan of money.

"Shares in joint stock companies are not, however, strictly speaking chattels; and it has been considered that they bear a closer resemblance *to choses in* action; or, in other words, they are merely evidence of property. They are, it is held, mere *demands* for dividends as they become due, and differ from moveable property which is capable of possession and manual apprehension." "If," says SHAW, C. J., "a share in a bank is not a chose in action; it is in the nature of a chose in action, and what is more to the purpose it is personal property. Ang & Ames on Corp. 9th Ed. sec 560; Hutchins *v.* State Bank, 12 Met. 421.

"Certificates of stock," says Comstock J. in Mechanics' Bank *v.* N. York R. R. R. Co., 3 Kern 627, "are not securities for money in any sense, much less are they negotiable securities. They are simply the muniments and evidences of the holder's title to a given share in the property and franchises of the corporation, of which he is a member." Under this view of the law, it would seem to be eminently proper for the legislature to fix the situs of property so anomalous in nature, for the purposes of taxation. The question, however, is not whether the act of 1867, under which these taxes were levied, was just or reasonable, but simply whether it was within the limits of legislative power. If it was not, then there is no power in our legislature to change any artificial rule of the common law, and many of the acts within our statute books are void for the same reason.

But in our opinion the act of 1867 was not only constitutional, but was also a very proper and even necessary exercise of legislative power. It places the situs of bank shares where, from the very nature of the property, it ought to be placed, for the purposes of taxation. The act of Congress itself contemplates a severance of the situs of such shares from the person of their owner, by providing that they should not be taxed except in the State where the bank is established. But apart from this, it is really much more reasonable to fix the situs of shares at the place where the bank is located, and where it must continue to do its business, or wind up its affairs, than to separate, by legislation, tangible personal property from the person of its owner. The latter may be in one county to-day, and in another to-morrow. Its actual situs is liable to constant change; and the title may be transferred by the owner wherever he may be. But not so with bank shares. The banking corporation has a fixed locality where it must transact its business, and there wind up its affairs when it ceases to exist. It is the trustee of the stockholders who must come to its counter for their annual dividends, and their share of assets on final liquidation. Its debts are payable at its counter, and credits receivable there. No transfer of stock can be completed unless shown upon the books of the bank. A list of the names and residence of all the stockholders must

be there kept. The property, in its own nature, possesses much more of the immobility of real estate than any other personal property which we can now call to mind. The legislature, then, did no violence to the nature of this property when it fixed the situs of the shares at the locality of the bank. We have seen that the exercise of the power, by the legislature, was both proper and legitimate. We have shown why it was proper and legitimate. It was necessary, because if this act had not been passed, much of the bank stock in the State would have soon escaped taxation by modes so obvious as to need no specification. As it is, this is impossible, The assessor of each county knows every bank in the county, and has but to go to the books to ascertain the ownership of the shares. The act, instead of defeating uniformity and equality of taxation, which is thetheory upon whioh its invalidity is asserted, does, in our judgment, tend to secure these results more effectually than any other method that could have been adopted.

This question has been before the highest courts of New York and New Jersey, and they have decided as we do.

National Bank *v.* Cook, 3 Vroom. 347. The People *v.* Commissioners of Taxes, 35 New York, 413.

We know of no authority that can be cited in support of the ruling of the Circuit Court of the United States for the Northern District of Illinois, to which we have already sufficiently adverted. The case just cited from 35 New York, in which this point was expressly ruled, was afterwards carried to the Supreme Court of the United States. This point was not deemed of sufficient importance to be raised before that court, and the judgment of the court of appeals of New York was affirmed there, without reference by the court to the question. 4th Wallace, 244.

We cannot regard the attempt of the national banks to shield their stockholders from all State taxation, as at all meritorious. They offer no grounds for the alleged exemption which we can regard as even plausible.

Although their franchises are conferred by act of Congress, still

all their business, so far as conducted with reference to profit, is done under our State laws, the same as corporations created by the laws of this State. It is by the laws of the State that their business transactions are governed, and by the same laws that their property is protected. So that they are under the same duty to contribute to the support of the State and municipal governments as any natural person or State corporation may be. Unless exempted by some plain rule of law, they should not ask a court of equity to relieve their stockholders from that duty.

Decree affirmed.

I, WOODBURY M. TAYLOR, Clerk of the Supreme Court of the State of Illinois, do hereby certify that the foregoing is a true copy of the final Opinion of the said Supreme Court in the above entitled cause, of record in my office.

In testimony whereof, I have set my hand and affixed the Seal of said

[L. S.] Supreme Court at Ottawa, this 4th day of February, in the year of our Lord A. D. 1873.

W. M. TAYLOR.

Supreme Court of the United States.

OCTOBER TERM, 1873.

THE MERCHANTS' NATIONAL BANK OF CHICAGO,
Appellee,
ads.
JOHN W. TAPPAN, COLLECTOR,
Appellant.

BRIEF FOR APPELLEE.

MELVILLE W. FULLER,
For Appellee.

CHICAGO:
CHICAGO LEGAL NEWS COMPANY, 161 AND 163 LASALLE STREET.
1874.

In Supreme Court of United States.

OCTOBER TERM, A.D. 1873.

JOHN W. TAPPAN, COLLECTOR, ETC., *Appellant,*

vs.

THE MERCHANTS' NATIONAL BANK OF CHICAGO, *Appellee.*

BRIEF AND ARGUMENT FOR APPELLEE.

MAY IT PLEASE YOUR HONORS:

In August, A.D. 1871, in the case of the *Union National Bank of Chicago* against *W. J. Onahan, Collector, etc.*, the Circuit Court of the United States within and for the Northern District of Illinois reached and announced the conclusion *inter alia*, that a certain act of the General Assembly of the State of Illinois in reference to the taxation of the holders of bank shares in respect to their shares, approved June 13, 1867, was null and void

because in contravention of the provisions of the State Constitution upon the subject of taxation. The opinion then delivered is appended to and asked to be taken as a part of this argument, and a copy thereof duly certified by the clerk of the court, and stating the time when the opinion was read, is filed with the papers in this cause.

The decree herein, now brought in review before this court, was based upon, and controlled by, the views expressed in the opinion in question, which is as essentially as much the opinion in this case as in that in which it was originally delivered.

Subsequently, and in October, 1872, the bill was filed in the case at bar, and decree therein rendered Dec. 5, 1872 (see printed record, p. 8), which record was brought here by appeal.

To the September term, 1872, of the Supreme Court of Illinois, a case involving the validity of the same act was taken by appeal from the Circuit Court of La Salle county, and in January, 1873, an opinion pronounced expressing views adverse to those long before announced by the United States Court.

The latter tribunal had obtained jurisdiction more than a year before this time, and had held the law void, and it now found itself in the position of having rendered decrees which the Supreme Court of the State had subsequently decided ought not to have been rendered. It seems to me that the question should, therefore, be considered upon its merits, and unaffected by the later decision of the State Court unless the views of the latter

commend themselves to this court as in themselves sound and worthy of adoption.

I propose to discuss this case without reference to the Supreme Court opinion in the first instance, and to consider that judicial utterance, and the extent to which it may be held binding upon this court, as a separate and definite subject of examination.

The appellee contends that—

I.

The assessment in question, and the law of June, 1867, under which the tax authorities assumed to proceed, are invalid and void because in contravention of settled fundamental principles of taxation, and in conflict with the Constitution of the State of Illinois.

1. The power of taxation can not be exercised unless there be jurisdiction over either persons or property.

"Where there is jurisdiction neither as to persons nor property," says Mr. Justice SWAYNE for the court in *St. Louis* v. *The Ferry Company*, 11 Wallace, 430, "the imposition of a tax would be *ultra vires* and void," and further "jurisdiction is as necessary to valid legislative as to valid judicial action."

And Judge COMSTOCK truthfully remarks in *Hoyt* v. *Commissioners, etc.*, 23 New York, 228, that it is a fundamental requisite to a well-adjusted system of taxation that it be harmonious, "but harmony does not exist unless the taxing power is exerted with reference *exclusively* either to the *situs* of the property or to the resi-

dence of the owner. *Both* rules can not obtain unless we impute inconsistency to the law, and oppression to the taxing power."

In Judge COOLEY's valuable work on *Constitutional Limitations* (p. 500), the principle is stated broadly thus: "Assessments upon real estate not lying within the taxing districts would be void, and assessments for personal property made against persons not residing in the district would also be void, unless made with reference to the *actual presence* of the property in such district."

I do not understand that this initial proposition is or can be disputed. "Indeed," as is said by Mr. Justice FIELD in the case of the *State Tax on Foreign-held Bonds*, 15 Wallace, 319, "it would seem that no adjudication should be necessary to establish so obvious a proposition."

2. What then is the law of 1867 in relation to the assessment and collection of taxes upon bank shares? Is the proceeding *in personam* or *in rem?* Obviously unless as to shares owned by non-residents, this enactment assumes to authorize the assessment and collection of taxes *in personam*, and this I understand the Attorney General to concede.

The act is given in full on pp. 6 and 7 of appellant's brief, and need not be repeated.

It does not authorize an assessment on the banks themselves, but does undertake to give the assessment made at the place of the bank's location force and effect as against shareholders not there resident.

Its first section provides that the *stockholders* of banks and banking associations "shall be assessed and taxed on the value of their shares of stock therein in the county, town or district, where such bank or banking association is located, and not elsewhere, whether such stockholder reside in such town, county or district or not."

By the proviso of the third section it is prescribed "that in all cases where such shares are owned by persons or corporations not residing or located in the county, town or district, in which said bank or banking association is located, then the collector of such county, town or district, shall have power and authority to collect such taxes in any county, town or district in this State, where such person or corporation may reside or be located."

This is decisive of the character of the act as a proceeding "*in personam.*"

The warrant is to run not against a specified *rem*, but against the person, and thereby becomes a lien, not on any particular but upon all such person's personalty.

Hill v. *Figley*, 23 Illinois, 420.

Sections 4th and 5th apply only to non-residents of the State. Under the 4th section the collector may have *an action* to collect the tax from the avails of the sale of such share or shares, and the tax is declared to be a lien on *such* shares. Section 5 provides for the retention by the bank of so much of any dividend or dividends belonging to *such* (*i.e.* non-resident) shareholders as shall

be necessary to pay the taxes assessed. These provisions may well enough be argued to constitute an equivalent for a proceeding *in rem*, although they rather furnish the basis for than constitute such proceeding, but *they are strictly confined to non-residents*, and serve only to make more obvious that residents are proceeded against *personally*.

In 1872 the General Assembly of the State of Illinois amended the law so as to read as follows:

"SEC. 38. The collector of taxes and the officer or officers authorized to receive taxes from the collector, may, all or either of them, have an action to collect the tax assessed on any share or shares of bank stock, from the avails of such share or shares; and the tax against such share or shares shall be and remain a lien thereon till the payment of said tax."

"SEC. 39. For the purpose of collecting such taxes, it shall be the duty of every such bank, or the managing officer or officers thereof, to retain so much of any dividend or dividends belonging to such stockholders as shall be necessary to pay any taxes levied upon their shares of stock respectively, until it shall be made to appear to such bank, or its officers, that such taxes have been paid; and any officer of any such bank who shall pay over, or authorize the paying over of any such dividend or dividends, or any portion thereof, contrary to the provisions of this section, shall thereby become liable for such tax; and if the said tax shall not be paid, the collector of taxes where said bank is located shall sell said share or shares to pay the same, like other personal prop-

erty. *And in case of sale, the provision of law in regard to the transfer of stock when sold on execution, shall apply to such sale.*"

Gross' Stat., 1872, Vol. 2, p. 342.

The act of 1867 contained the following sections on this subject :

"§ 4. The collector of taxes, and the officer or officers authorized to receive taxes from the collector, may all, or either of them, have an action to collect the tax assessed on any share or shares of stock *owned by non-residents* of this State, from the avails of the sale of *such* share or shares, and the tax assessed against such share or shares, shall be and remain a lien thereon till the payment of said tax.

"§ 5. For the purpose of collecting *such* taxes, and in addition to any other laws not in conflict with the Constitution of the United States relative to the imposition of taxes, it shall be the duty of every such bank, banking association, and the managing officer or officers thereof, to retain so much of any dividend or dividends belonging to such stockholders as shall be necessary to pay any taxes assessed in pursuance of this act, until it shall be made to appear to such officers that such taxes have been paid; and any officer of any such bank or banking association who shall pay over or authorize the paying over, of any such dividend or dividends, or any portion thereof, contrary to the provisions of this section, shall thereby become personally liable for all such tax. And if the said tax shall not be paid, the collector of taxes where said bank is located, shall sell

said share or shares to pay the same, like other property."

Gross' Stat., 1869, p. 618.

These provisions apply to non-residents only, while in the act of 1872 they are made applicable to *all* the shareholders, resident as well as non-resident. And the latter enactment makes provision also for the enforcement of the lien on shares therein and thereby declared to be created.

The taxes in question were assessed under the act of 1867, that of 1872 not going into effect until July 1, which was after said assessment, but I quote the law as amended, in order that this court may note the significant fact that the provisions distinctly marking the first act as a proceeding *in personam* as to residents, are eliminated, and the retention of dividends, the lien on shares, all the features of a proceeding *in rem*, are applied alike to *all* shareholders.

It ought to be observed that it is provided in neither of these laws that the bank shall pay the taxes out of dividends reserved.

In *National Bank* v. *Commonwealth*, 9 Wallace, 362, this court upheld a law of Kentucky which imposed *State* taxes upon bank shares at a certain fixed rate per cent., and required the bank to pay such taxes, but upon the distinct ground that this amounted to a tax *in rem*, and could be sustained upon the analogy of proceedings by attachment and garnishee process. But the law under consideration does not, and does not purport to, provide

for any such proceeding. On the contrary, as we have seen, it is purely a proceeding *in personam*.

And in this the General Assembly followed the course of all previous State legislation in reference to moneys, credits, investments in bonds, stocks, etc., which are declared taxable as belonging to "persons *residing* in the State, *or used or controlled* by persons residing in this State."

Gross' Stat., 1869, Chap. 89, Div. II., Sec. 1, p. 580.

The obvious difference between taxing property "*through* the owner and not the things themselves" is suggested and acted upon by this court in the *St. Louis Bridge Case*, 11 Wallace, 430.

The broad distinction between proceedings *in rem* and those *in personam* is also admirably illustrated by this court in a series of decisions under the confiscation acts.

Thus, in *Pelham* v. *Rose*, 9 Wallace, 103, where the information, the monition, the marshal's return, the decree and sale, described a promissory note of Pelham as the *res* proceeded against, it was held that the note and not the credit or debt which it represented was alone the subject of seizure, and not having been seized, jurisdiction did not obtain.

Miller v. *The United States*, 11 Wallace, 296; *Pelham* v. *Way*, 15 Wallace, 201, and *Brown* v. *Kennedy*, Id., 591, present the same distinction, and place in the clearest light the ease with which proceedings *in rem* can be legitimately conducted, and the difficulties which arise when the well-settled law on the subject is disregarded.

It should be noted also in reference to the case of *Commonwealth* v. *National Bank*, 9 Wallace, 362, that the tax in question was purely a State tax and covered all taxes of that description.

Municipal taxes stand on a different footing.

Davenport v. *Dows*, 15 Wallace, 390.

Considered then as authorizing proceedings *in personam*, it seems to me that the act of 1867 is clearly invalid, because of the utter absence of jurisdiction on the part of the tax authorities of the school district or town of South Chicago, South Park district, city of Chicago, and county of Cook, *over the persons* of all residents of the State who do *not* reside in that town, city and county, and therefore, for reasons hereinafter stated, is entirely invalid. This upon the application of the fundamental principles of valid taxation and irrespective of the provisions of the State Constitution, which seem to place the question beyond dispute.

And I submit that the argument for appellant, which could only be entitled to weight from the stand-point that the act of 1867 is directed against the shares as property, falls to the ground in view of the fact that the enactment relates to proceedings *in personam* merely.

3. But upon the hypothesis that the act were otherwise in its terms than it is, the question arises what the character of the property is upon which or upon the owner of which in respect thereto (as is the fact) it is claimed that these taxes were imposed?

Shares of stock represent a property interest separate

from the capital stock, or real and personal property belonging to the corporation, and are not only governed by the rule that personal property follows the person of the owner, but being incorporeal personal property are incapable of having any *situs* save at the domicile of the owner.

Williams on Pers. Prop., 191.

Stock cannot be taxed on account of its locality, and any tax imposed upon it must be in the nature of a tax upon income, and of necessity *confined to the person of the owner.*

Angell & Ames on Corp., § 458.

The shareholder has "only the immediate right to receive his share of the dividends as they are declared, and the remote right to his share of the effects on hand at the dissolution of the institution."

The Union Bank v. *State*, 9 Yerger, 501.

"The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts."

NELSON, J. *Van Allen* v. *Assessors*, 3 Wallace, 583–4.

This, as Judge Nelson declares, is a distinct, independent interest or property, held by the shareholder like any other property that may belong to him, and it is this interest which the act of Congress left subject to taxation by the States.

It is a right or property as distinct from the capital stock, franchise or corporate property of the company, as a debt is distinct from the debtor, or the mortgaged debt from the mortgaged premises. The debt, whether secured by mortgage or not, and although it may fully equal, and thus represent all the property of the debtor, is nevertheless liable to be taxed to the creditor, notwithstanding all the property which it represents, and which forms the entire basis of its security, may have also been taxed to the debtor, but the creditor cannot be taxed in the place of the domicile of the debtor *unless he resides there.* Nor can the debtor be taxed for the debt and allowed to deduct the tax from the debt. Nor can a tax against the creditor be imposed upon the property which is pledged or mortgaged to secure a debt, and thus made to apply towards the payment of the debt. The taxable quality of shares of stock arises solely from the supposed income arising therefrom, and has no reference whatever to the estate of the corporation, but solely to the domicile or residence of the holder or owner, and is taxable to the owner in the place of his domicile or residence, without reference to any tax imposed upon the corporation, its property or capital.

It is therefore that the weight of authority is that it is not within the power of a State legislature to cause a non-resident shareholder to pay taxes upon the value of his shares.

Union Bank v. *State*, 9 Yerger, 490.
Connell v. *Connellsville*, 15 Ind., 150.
Savings Bank v. *Nashua*, 46 N. H., 398.
Dwight v. *Mayor*, 12 Allen, 322.

Austin v. *Aldermen*, 14 Allen, 364.
McKeen v. *Northampton Co.*, 49 Pa., 519.

In *State* v. *Ross*, 3 Zab., 517, it is decided that non-resident holders cannot be taxed for their shares, and it is well said that the attempt to do it "*tends to weaken the bonds of the Union, by discouraging commercial intercourse and commercial relations.*"

And in *State* v. *Thomas*, 2 Dutcher, 181, it was held that a corporation is not liable to be taxed upon the shares of non-resident owners, and that if they pay such a tax, they can not retain out of dividends declared upon such shares.

So in *City of Evansville* v. *Hall*, 14 Ind., 27, the *situs* of shares of an insurance company for the purposes of taxation is declared to be the domicile of the owner, and in *Wilkey* v. *City of Pekin*, 19 Ill., 160, it is held that municipal corporations are confined in the exercise of the taxing power to property *actually* within their territorial jurisdiction. Authority upon this branch of the discussion is, however, unnecessary in view of the opinion of this court in the case of the *State Tax on Foreign-held Bonds*, 15 Wallace, 300, wherein it was held that State taxation upon bonds held by a non-resident cannot be sustained upon the ground that the power of taxation of a State is limited to persons, property and business within her jurisdiction, and that bonds held by a non-resident are not properly within the jurisdiction. It is conceded that loans might be taxed, though held by non-residents, *if in the charter of the company the imposition of the tax were authorized.*

The non-resident owner of shares of stock is taxable therefor in respect thereto at the place of his domicile or residence.

The right which Illinois claims and exercises, to tax its residents upon shares in foreign corporations, flows from its possession of jurisdiction over the property rights of that character, of those residents, as such; and is accompanied by the corresponding want of authority to inflict upon the citizens of other States holding shares of stock in Illinois corporations, the opposite rule of taxation.

As to the property, capital stock, or franchises of a corporation within the jurisdiction of the State, either (in the absence of exemption,) may undoubtedly be taxed, but the imposition of a tax upon the sources of income of a non-resident, is nothing less than an arbitrary appropriation of private property belonging to citizens resident abroad, to the public use of the State, when the owners are not notified of the proceedings or represented in the legislature.

The provisions of the act of Congress do not conflict with but confirm this view. By the terms of the proviso to the 41st section of the National Currency Act, and of the act of February, 1868, the holder of national bank shares residing in other States than those of the location of the banks, are expressly *inhibited* from subjecting the shares to taxation, which, if State taxation were permitted at all, would have been lawful in the absence of this limitation.

The result of the great cases, *McCulloch* v. *The State of*

Maryland (4 Wheaton, 316); *Osborne* v. *The United States*, (9 Wheaton, 738); and *Weston* v. *The City of Charleston*, (2 Peters, 449,) is that Congress may constitutionally organize or constitute agencies for carrying into effect the national powers granted by the Constitution; that these agencies may be organized by the voluntary association of individuals, sanctioned by Congress: that Congress may give to such agencies so organized, corporate unity, permanence and efficiency; and that such agencies, in their being, capital, franchises and operations, are not subjected to the taxing power of the States.

In the granting of chartered rights and privileges by government, especially if of great value to the corporators, certain burdens are usually imposed as conditions of the grants, and such burdens were imposed by the National Currency Act, among them being limited State taxation against the owners in respect to their shares. And it is because the non-resident shareholder has acquired his shares *subject to this condition*, that the tax in such case is lawful. He takes them *cum onere*.

Where a party has property actually situate in a State, and resides elsewhere, his property is justly subject to all valid claims that may exist against him there; but beyond this, *due process of law* would require appearance or personal service before the defendant could be personally bound by any judgment rendered.

And any law which undertakes to order deductions for taxes from the dividends on all shares, would to that extent, impair the obligation of the contract between

the bank and its shareholders, in the absence of *charter* provisions permiting that course to be taken.

From this review of the authorities and the reason of the thing, I think it may fairly be assumed that shares of stock are incapable of an *actual* situs, and can not be held to be susceptible of taxation *ex directo* as being property *actually per se* within the jurisdiction of the taxing power vested in the authorities at the place of the location of the corporation by which they were issued.

The question, as presented on appellant's behalf, is not whether the State legislature may not devise some mode of taxing shares in the immediate taxing district of the bank's location, though this under the State Constitution, I deny, but whether the legislature can impart tangibility to that which is intangible; and this can no more be done than any physical change contrary to nature, can be wrought by legislative act or resolution. *Jura naturæ sunt immutabilia!*

When it is said that the rule that personal property follows the person of its owner is a legal fiction, the reference is to that kind of personalty which is in itself capable of an *actual* situs.

That such property follows the person is indeed a fiction, because the property is *in fact* in *one place* when the owner is *in another*. But when the right to dividends and to share in a remote distribution of assets upon dissolution, is declared to be with the possessor of such right, who can alone assert it, this is not a fiction but the fact.

It would be a fiction, and an indefensible and unnecessary one, to establish the opposite rule by legislation.

It need not be denied that original charters of incorporation might be so framed that the holders of shares of the capital stock of corporations thereby created, should take such shares *cum onere* that the rights arising upon such shares could be exercised in no other place than that of the location of the corporation, but it is obvious that unless this were so originally provided, the obligation of the contract would be impaired by any subsequent legislative attempt to accomplish it. And I repeat that non-resident holders of shares are not taxable in respect thereto, except at the place of their residence.

It is clear that the States other than that of the location of the corporation can not be deprived by the latter of the right to tax *their own* citizens.

Congress, as to corporations created by it, can establish a *uniform* rule, excluding taxation *elsewhere* than as designated, but State legislatures can not.

Redfield Supp. to Law of Railways, p. 493.

The laws of Congress govern throughout the country, while State laws have no extra territorial effect save *ex comitate*.

4. Applying these principles, it is perfectly clear that the law in question is invalid because in contravention of the Constitution of the State of Illinois.

The National Currency Act of Congress, of June 3, 1864, made no provision as to the taxation of non-resi-

dents, and the complainant was organized under that act.

The act of Feb. 10, 1868, did provide that non-residents should be taxed where the bank is located, and not elsewhere.

2 *Brightley's Dig.*, pp. 56, 67.

But the acts of Congress referred to make no such provision as to resident holders of national bank shares, who are to be taxed by the State authorities *in such manner and place* as may be lawful.

The legislature of the State must impose such taxes *in the manner and for the purposes designated in the State Constitution. It is not in the power of Congress to authorize a violation of the State Constitution in the assessment and collection of taxes for State or local purposes*, nor has that body attempted to do so.

The law of 1867 was enacted under the Constitution of 1848, the second and fifth sections of whose ninth article prescribed two rules of taxation.

The first rule is: "The General Assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property."

Const. 1848, Art. IX., Sec. 2.
Gross' Stat. 1869. p. 37.

The second rule is: "The corporate authorities of counties, townships, school districts, cities, towns, and villages, may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform *in*

respect to persons and property within the jurisdiction of the body imposing the same. And the General Assembly shall require that all the property within the limits of municipal corporations, belonging to individuals, shall be taxed for the payment of debts contracted under authority of law."

Const. 1848, Art. IX., Sec. 5.
Gross' Stat. 1869, p. 37.

It is settled law that these provisions are *restrictions* upon the power of taxation by the legislature or any authority under it.

Harward v. *St. Clair, etc.*, 51 Ill., 130.
Chicago v. *Larned*, 34 Ill., 267.
Taylor v. *Thompson*, 42 Ill., 9.

Article IX. of the State Constitution, adopted in 1870, thus provides:

"SEC. 1. The General Assembly shall provide such revenue as may be needful, by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property—such value to be ascertained by some person or persons, to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise; but the General Assembly shall have power to tax peddlers, auctioneers, brokers, bankers, merchants, commission merchants, showmen, jugglers, inn-keepers, grocery-keepers, liquor-dealers, toll-bridges, ferries, insurance, telegraph and express interests or business, vendors of patents, and persons or corporations owning or using franchises and privileges, in such manner as it shall from time to time

direct by general law, uniform as to the class upon which it operates.

"SEC. 9. The General Assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment or by special taxation of the contiguous property or otherwise. *For all other corporate purposes*, all municipal corporations may be vested with authority to assess and collect taxes; but such taxes shall be *uniform*, in respect to persons and property, *within the jurisdiction of the body imposing the same.*

"SEC. 10. The General Assembly shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes; but *shall require that all the taxable property within the limits of municipal corporations* shall be taxed for the payment of debts contracted under authority of law, such taxes to be *uniform* in respect to persons and property, *within the jurisdiction of the body imposing the same.* Private property shall not be liable to be taken or sold for the payment of the corporate debts of a municipal corporation.

"SEC. 12. No county, city, township, school district, or *other municipal* corporation, shall be allowed to become indebted in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for State and county taxes, previous to the incurring of such indebtedness. Any county, city, school district, or *other municipal* corporation, incurring

any indebtedness as aforesaid, shall before, or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt, as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same. This section shall not be construed to prevent any county, city, township, school district, *or other municipal corporation*, from issuing their bonds in compliance with any vote of the people which may have been had prior to the adoption of this Constitution, in pursuance of any law providing therefor."

Whatever distinctions may exist between municipal corporations proper as towns and cities and such corporations as counties, it is manifest from the foregoing that counties, school districts, townships and cities are for the purposes of corporate taxation considered as municipal corporations, and the provisions of the Constitution of 1870 are to be taken as substantially the same as those of the Constitution of 1848.

In *The People, etc.*, v. *Salomon*, 51 Ill., 52, the South Park district is held by the Supreme Court of Illinois to be a "*public municipal corporation.*"

The act of June 13, 1867, conflicts with the constitutional rules in question, because it directs taxes to be assessed by the authorities of counties, towns, cities or districts upon the shares owned by shareholders in the county, town or district where the bank is located, without regard *to the residence of the owner or the situs of the shares.*

This can not be valid whenever such owner resides in

a different county, town or district, for the provisions of the Constitution require that all taxes assessed by the corporate authorities of counties, cities, towns or districts, shall be *uniform in respect to persons and property within the limits of such county, city, town or district.* This compels the taxation of the stock owned by any resident of the State in the county, town or district where he resides, for the purpose of collecting county, city, town or district taxes; and any failure to do so would destroy the uniformity required by the Constitution with respect to the property within the limits of the body imposing the taxes.

The shares can not be taxed in two different counties, cities, towns or districts, because it would be a violation of the fundamental principles governing all taxation, as well as in conflict with the constitutional provision which requires that every person shall *only* pay a tax *in proportion to the value of his property.*

It therefore appears that the law of June, 1867, so far as it directs the assessment of shares owned by residents of the State who reside outside of the county, city, town or district where the bank is located, is in conflict with the constitutional provisions and void.

Being void and inoperative to this extent, the question arises as to its effect on the owners of shares who reside in the same county, city, town and district where the bank is located. But the same conclusion is inevitable, for the statute having provided no mode for the assessment of the shares of residents of the State in the place where *they* reside, as required by the Constitution, the

assessment as to them for every kind of tax, including State taxes, is void.

The owners of shares who reside in the same place where the bank is located, can not be compelled to pay State taxes, because the legislation is such that every person and corporation is not compelled to pay a tax in proportion to the value of his or her property, according to Section 2, Article IX, and the taxes for State purposes are not levied with uniformity.

Again, it was the object of the legislature, in the act of 1867, to change the mode of taxation on banks and banking associations from an assessment of the capital stock to one on the shares, so as to subject them all to taxation for State, county, city, town, and district taxes. If the statute is unconstitutional as to a large class of persons residing elsewhere in the State than the place where the bank is located, it would so far defeat the object in view as to invalidate the whole act. It is such an entirety that the whole act must stand or fall together.

There being then no valid law in force in this State, by which the shares of stock in national banks, belonging to residents of the State, can be taxed, the shares owned by non-residents can not be taxed, because the proviso to section 41 of the act "to provide a national currency," of June 3, 1864, expressly declares that there shall be no tax imposed upon non-residents that is not imposed upon residents of the State.

Van Allen v. *Assessors*, 3 Wallace, 573.

Such a regulation would be in conflict with the pro-

vision of the Federal Constitution, which says, "the citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States."

Constitution U. S., Art. 4, § 2.

It is said by Judge COOLEY (*Constitutional Limitations* * 496): "As to all taxation apportioned upon property, there must be taxing districts, and within these districts the rule of absolute uniformity must be applicable. A State tax is to be apportioned through the State, a county tax through the county, a city tax through the city, while in the case of local improvements, benefiting in a special and peculiar manner some portion of the State, or of a county or city, it is competent to arrange a special taxing district, within which the expense shall be apportioned; school districts and road districts are also taxing districts for the peculiar purposes for which they exist, and villages may have special powers of taxation, distinct from the townships of which they form a part."

[The South Park district is an illustration of special taxation within certain limits for a peculiar purpose. See *People* v. *Saloman*, 51 Ill., 37, and taxes for that, form part of the assessment in question.]

Whatever may be the basis of taxation, Judge COOLEY continues "The requirement that it shall be uniform is universal. And to render taxation uniform, two things are essential. *The first of these is that each taxing district should confine itself to the objects of taxation within its limits.*" Under this rule it is that assesments upon real estate not in the district, or for personal property not actually there situ-

ate, made against persons not residing in the district, are held void.

In Missouri, the power to tax in one district, property situated in another, is denied upon the express ground that it is in substance, the arbitary taxation of the property of one class of citizens for the benefit of another class.

Wells v. *City*, 22 Mo., 385.

See, also,

City of Covington v. *Southgate*, 15 B. Monroe, 491.
Morford v. *Unger*, 8 Iowa, 82.
Langworthy v. *Dubuque*, 13 Iowa, 86.

" *The second* essential is that the apportionment of taxes should reach *all* the objects of taxation *within* the district."

" To compel individuals to contribute money or property to the use of the public, without reference to any common ratio, and without requiring the sum paid by one piece or kind of property, or by one person, to bear any relation whatever to that paid by another, is, it seems to me, to lay a forced contribution, not a tax, duty or impost, within the sense of those terms, as applied to the exercise of powers by any enlightened or responsible government."

Woodbridge v. *Detroit*, 8 Mich., 301.

This principle is elaborately considered in the interesting case of *Knowlton* v. *Supervisors of Rock County*, 9 Wisconsin, 410.

See also

Phila. Assoc. v. *Wood*, 39 Pa., 73.
Sacramento v. *Crocker*, 16 Cal., 119.

The principle is that the rule of apportionment must be uniform throughout the taxing district, applicable to all alike; but the legislature have no power to arrange the taxing districts arbitrarily, and without reference to the great fundamental principle of taxation, that the burden must be borne by those upon whom it justly rests.

In Illinois the decisions have been many and uniform. In *Trustees, etc.*, v. *McConnell*, 12 Illinois, 140, it is held: "The Constitution of the State expressly declares that the mode of levying a tax shall be by valuation, 'so that every person and corporation shall pay a tax in proportion to the value of his or her property.' Under this provision the legislature would have no power to exempt from taxation one species of personal property, while it collected a tax from another within the same *jurisdiction*."

Does not this act palpably contravene this obvious conclusion?

To give to the county of Cook, city of Chicago, town of South Chicago, and South Park district, the proceeds of taxation in respect to shares owned by a resident of Kane or La Salle or any other county than Cook, and of another city, town, or district, is *to exempt* the latter where he lives, and tax his co-residents to make up the deficiency.

In *O'Kane* v. *Treat and al.*, 25 Illinois, 557, a provision of a city charter exempting its citizens from paying town taxes for roads beyond the city limits, which had been imposed by the town within which the city was, was held in conflict with the constitutional provisions providing

for equality of taxation based upon valuation, and therefore void.

In *Hunsaker* v. *Wright*, 30 Illinois, 148, the court say that the design of the provisions of the Constitution in relation to taxation was "to impose an equal proportion of these burdens upon all persons within the limits of the district or body imposing them. Under these provisions the legislature has no power to exempt or release a person or community of persons from their proportionate share of these burthens. Not having such power themselves, they are unable to delegate such power to these inferior bodies."

In *S. & M. R. R. Co.* v. *The Co. of Morgan and Town of Jacksonville*, 14 Ill., 163, it was held that personal property follows the owner, and is there taxable if the owner resides within the State; and the property taxed, if temporarily absent, is nevertheless subject to taxation. That portion of a railroad which lies within a county is taxable there, and the valuation of the road must be of that specific part of it situated in such county, without reference to the value of the whole road.

In *Mills* v. *Thornton*, 26 Illinois, 300, the court decides that personal property is taxable at the residence of the owner, unless permanently located in another place. This was a bill to enjoin the collection of school district taxes.

In *King* v. *McDrew*, 31 Illinois, 421, taxes were enjoined as contrary to law, the complainant having been taxed in two counties on the same property. The court comment upon the provisions of the revenue law requir-

ing personal property, money, or credits, "*except such as is required to be listed otherwise*, shall be listed in the county, town or district where the owner resides," and say that "the property falling within the exception is obviously such as is held by guardians, agents, and in other specified fiduciary relations." The statute so referred to remained the same (unless changed by this act) when the assessment in this case was attempted to be made (*Gross' Stat.* 1869, p. 582, § 4), and in view of the constitutional provisions, is in force without regard to this act.

In *Chicago* v. *Larned*, 34 Illinois, 275, the court say: "The framers of our Constitution have taken *unexampled* pains by these separate sections (Secs. 2 and 5, Art. IX.) to affirm the principles of 'equality' and 'uniformity' as indispensable to all legal taxation, whether general or local. Section five is believed to be *peculiar* to our Constitution, and manifests the great anxiety of its framers to place every possible species of taxation upon the only equitable basis conceivable, and is believed to be *more stringent than any provision in any other State Constitution on the same subject.*"

So says Chancellor Kent—2 *Kent's Com.*, *333.

Assuming the fundamental idea of a tax to be a *burden*, that burden must nevertheless be imposed according to *value* in each district, and with *uniformity* in each district. Equality of contribution to the public burdens is essential to equality of social and political right. A just exercise of the power of taxation implies an equal rule of taxation, exacting from each person or thing taxed a proportionate share only of the public support.

That proportionate share can only be ascertained and arrived at, and the constitutional rules observed, by the application of a uniform rule within each taxation district, and to tax B for the benefit of A, when the latter enjoys the same privileges and benefits as the former, is utterly destructive of the rule of uniformity and of the principle of proportionate contribution.

In *The People, etc.* v. *Salomon*, 51 Illinois, 48, the court, in commenting on Section 5, Art. IX. of the State Constitution, say: "We have held in *Harward* v. *The St. Clair & M. L. & D. Co.*, reported *post* page 130, and in the case of *The People ex rel. McCagg* v. *The Mayor etc. of Chicago*, *ante*, p. 17, that this clause must be construed as a limitation upon the power of the legislature to authorize any other than corporate authorities to assess and collect local taxes. But while this position limits the objects of local taxation to corporate purposes, and the delegation of the power of taxation to the corporate authorities of counties, townships, school districts, cities, towns and villages, it clearly does not prevent the legislature from creating districts by the union of two or more towns in the same county, for any special township purpose, such as building a bridge, etc. * * *

"By our Constitution, taxation is apportioned upon property by *the rule of uniformity, and to do this, there must be taxation districts.* A State tax is apportioned throughout the State, as a county tax is throughout a county, or a city tax throughout a city; while in the case of a mere local improvement, such as a public park, benefiting more immediately those particular towns, where is the constitutional incompetency of the legislature to be

found to arrange those towns into a special taxation district, within which the expense shall be apportioned, and whose people and property shall bear the burden they have themselves imposed?"

In 1869, the General Assembly created the "South Park district," composed of South Chicago, Hyde Park and Lake, and authorized commissioners to cause a sum not exceeding three hundred thousand dollars annually, to be raised by taxation "on the taxable property of said towns, according to the several assessors' returns for the respective years," the tax to be extended by the county clerk, and collected as State and county taxes.

The same legislature provided for a park in the town of West Chicago, and by the act imposed a tax of one half of one mill "upon all the taxable property in said town of West Chicago," the same to be extended by the county clerk, and collected as State and county taxes.

The same legislature passed an act to extend Lincoln Park, and provide for its improvement, and therein authorized the supervisors of the towns of North Chicago and Lake View to cause a tax to be levied "upon the taxable property in each town," making the same so that there shall be "uniformity with respect to persons and property in said towns," to be extended by the county clerk as other town taxes, and to be collected as part of and as other town taxes."

Private Laws Illinois, 1869, Vol. 1, pp. 342, 358, 368.

Two of these acts are discussed and considered in

People etc. v. *Mayor etc.*, 51 Illinois, 19.
People etc. v. *Salomon*, 51 Illinois, 37.

Hundreds of the shareholders of the national banks located in these districts, do not reside in either of them, and the question arises, can they be subjected to taxation for the purposes named, under such circumstances?

Demonstrably as to real estate, and probably as to other corporeal property susceptible of an *actual situs*, such taxes might be sustained, but upon what principle shall the owners of incorporeal and intangible interests, like shares of stock, be subjected to taxation in districts other than those of their residence, when the authorities of the latter have the right to compel the payment of local taxes from every individual within their jurisdiction, *in proportion* to the value of his property—a right existing *ex vi termini* the fundamental law, and which legislation can not take away?

The question is one of principle, and is to be decided in its general relations, rather than upon particular facts.

It is immaterial (as this court remarks in *Morgan* v. *Parham*, 16 Wall., 478,) whether taxes have actually been levied upon these shareholders in other districts than that of the bank's location or not. It is enough that the tax authorities of the district of the owner's residence have the constitutional right to levy such taxes, and that the citizens of such district have the constitutional right to insist thereon.

Nor is it material to discuss how many holders of the shares of the capital stock of the appellee, resident in

the State of Illinois, reside in South Chicago, and how many in some other town or district. It is alleged by the bill, admitted by the demurrer and not denied, that hundreds of the Illinois shareholders in banks in South Chicago, reside in other districts, and the number so situate varies in the various banking corporations.

It is remarked, justly, as I think, in *People* v. *Mayor*, 4 Comstock, 419, that a property tax for the general purposes of the government, either of the State at large or of a county, city, or other district, is regarded as a just and equitable tax. The reason is obvious. It apportions the burden *according to the benefit* more nearly than any other inflexible rule of general taxation.

But is any tax for local purposes justifiable when levied against persons and property receiving *ex facie* no benefit therefrom?

Why should a citizen of the city of Springfield and county of Sangamon, happening to own shares of stock in a bank in South Chicago, pay for roads, schools and parks in Cook county?

Taxation and eminent domain rest upon substantially the same basis. Each is a taking of private property upon compensation made, though the compensation is different in the two cases. Now where is the compensation in this instance? In what possible way is an equivalent afforded the tax-payer? Upon what conceivable ground can the levy of park taxes be justified under such circumstances?

Again, if A and B reside in Sangamon county, and A

has his money invested in shares of a bank in Cook county, while B's is invested in the city of Springfield; A under this law escapes local taxation where he resides, and B pays the taxes for him in the teeth of the provision requiring each person to pay *only* in proportion to the value of his property.

It is doubtless true that such results are sometimes produced by over-valuation on the part of assessors, and that in such cases the mischief being the consequence of errors of judgment on the part of administrative officers, is of such a character as to be incapable of judicial redress, but when the result is inevitable from the statute itself; when it is the positive command of the written law, then not in vain does the injured citizen resort to the majesty of the Constitution and the courts for protection. The statute would be held to be one which the legislature had no power to enact, and the hands of the officer who attempts to execute it must be stayed.

It is said that the numerous decisions to the effect that taxing districts must be confined to property within their limits, in the imposition of taxes, are based upon two reasons, to wit: because it would be inequitable to tax property not receiving governmental or corporate protection within the district assuming to tax it, or in the case of purely local taxation some compensation or benefit in the way of equivalent, and because of the exposure of the property to double taxation; but that neither of these reasons exists in the case at bar.

Argument might fairly be made that the true principle of taxation is as stated by Mill: necessity, and the rule,

"*equality* of sacrifice," but putting it upon the ground of the equivalent being found in protection or local benefit, it is difficult to see that that justifies the enactment under consideration.

The corporate property, franchises and capital stock of corporations may indeed be taxable upon that principle at the place of their location. The fact that these, or either of them, may be exempt under State or Federal law affords no argument one way or the other, as exemptions are entirely within the discretion of the granting authority.

The income in respect to which the taxation is justified, is enjoyed in other States and in other districts of Illinois, and the resident owner is taxable in respect thereof in the district of his residence and where the equivalent is rendered, by the terms of the State Constitution, and the non-resident in his own State, except in respect to national bank shares, for the reasons given.

So also the objection arising from the duplication of taxation is not removed by the terms of the law in question. Residents are still subjected to taxation upon shares in foreign banking corporations, and non-residents of Illinois are so subjected in their own States as to shares in Illinois banking corporations.

And the particular provisions of the national currency act do not change the general principle.

And it should again be remarked that the laws of Congress bind throughout the country, while the laws of the States do not.

It is contended that the taxation of bank shares was intended as an equivalent for the revenue lost by the exemption of bank capital.

That it was expected as to national banks that they would take the place of State banking institutions, from taxes on which the State derived considerable revenue, and that Congress therefore conceded the right to tax the shares in order, to that extent, to conciliate the public mind, may be admitted, but the conclusion sought by no means follows, for there is no difficulty whatever in taxing the shares under a law properly enacted for that purpose.

No reason is perceived why the owner of shares residing in Illinois may not be taxed for State, county, city, town and district taxes where he resides, and the non-resident at the location of the bank, for State taxes at least, if it be a *national* bank, but not if it be a State corporation.

If the shares can be taxed at all at the place of the bank's location, irrespective of the owner's residence, it must be by requiring the bank to pay the taxes, or some equivalent process *in rem*. It does not seem probable, however, that under the State Constitution even this could be done as against residents of the State living out of the bank's district. It is sufficient for the purposes of this case that this has not been attempted by the law of June, 1867.

It may be objected that the law is valid as to those shareholders residing where the bank is located, and that therefore the assessment is not entirely void, but as I

have already said, the object of the statute was to change the mode of taxation on banks and banking corporations from an assessment on capital stock to one on shares, so as to subject them all to taxation for State, county, town, and district taxes, and therefore if the statute fails to accomplish this as to a large class of persons residing elsewhere in the State than the place of the bank's location, the object is so far defeated as to invalidate the whole act. And again, as I have said, the rule of uniformity is utterly violated as to shareholders residing in the place of the bank's location, to tax them and not their co-shareholders, and obviously so as to all taxpayers in the districts where non-paying Illinois shareholders resided, who would be compelled to pay the taxes of the latter *there* as well as their own.

The truth is, that the law in question would never have been enacted but for an obvious and most natural error on the part of the General Assembly growing out of the language of the National Currency Act.

The proviso to the 41st section of that act provided that national bank shares should be taxed at the place of the bank's location and not elsewhere, and it is perfectly plain that the act under consideration was framed under the not unnatural misapprehension that the "place" referred to meant the taxing district rather than the State, a misapprehension widely prevalent and not altogether removed until the act of Congress of Feb. 10th, 1868.

Judicial decisions had been widely variant upon the point.

In the State of Maine a question arose as to the validity of so much of a State law providing for the taxation of national bank shares in the place where the banks were located, as required the *proceeds* to be *distributed* among the different towns where the stockholders resided.

This was held invalid by the Supreme Court of that State, upon the ground that the "place where the bank is located" in the National Currency Act, meant the taxation district and not the State, and therefore confined the levy to the district of the bank's location, and that therefore such district was entitled to the *entire* proceeds.

Opinion Justices Sup. Ct., 53 Maine, 594.

In *Markoe* v. *Hartranft*, 6 Am. Law Register, 490, it was held by Mr. Justice Agnew, of the Pennsylvania Supreme Court that the purpose of the words, "the place where the bank is located," was "to localize the authority which imposes the tax," and *not* the assessment of taxes *at the place* of the location of the bank; and he declared that "to localize the assessment at the place where the bank is, would be either to confine the assessment *to the bank itself* on behalf of its shareholders, or to confine it to the shareholders *residing at the place where the bank is located.*"

In *Austin* v. *The Aldermen, etc.*, 14 Allen, 364, the Supreme Court of Massachusetts sustained the validity of a State law providing for taxing bank shares at the various districts of the shareholders' residence, holding that "the place where the bank is located" meant the State and not the district; that Congress could not have intended to control the State in such a matter, and indeed

had not the power to do so. The court says: "It is evident from the whole terms of the proviso that Congress did not contemplate a general tax by the State upon all the shares of the bank collectively, without reference to the jurisdiction which the State might have over the shareholder, because the mode of taxation which it authorizes is only by including the shares in the valuation of the personal property of the persons taxed. The effect of the construction which we give is open to the objection that it relieves from the taxation of their shares the shareholders not residing in the State; or at least that it may do so under our system of taxation. But on the other hand, we can see no reason why Congress, which was dealing with questions between the State and the nation, should have sought to make a distinction between shareholders living in the particular city, or town, or village, or ward, or county in which the bank is located, and other shareholders within the same State."

Markoe v. *Hartranft* and *Austin* v. *Aldermen* were cited with approval, and the same result announced in *Clapp* v. *Burlington*, 42 Vermont, 579. The court held that shares should be taxed to the owner in the town or city of his residence, and that "the proviso to the 41st section of said act of Congress was only intended to confine the power of taxation of shares in stock in national banks to the State having jurisdiction at the place where the bank is located; and is for the sole purpose of determining what *State* shall have jurisdiction to tax the owners of the said stock for the same."

These decisions were all rendered without reference to or before the passage by Congress of the act of February

10th, 1868, which defines the place as referring to the State only, and demonstrates the correctness of the view taken by the courts of Pennsylvania, Massachusetts and Vermont.

It is not unreasonable to suppose that the General Assembly assumed the proviso to the 41st section as operating as a limitation of the taxation to the district of the bank, and did not sufficiently apprehend that Congress neither could nor did attempt to require a mode violative of the State Constitution.

I have thus shown that the law and assessments in question are void, because in violation of the general principles of taxation and the particular provisions of the State Constitution of Illinois, and I beg the court, in relation to the latter, to observe that in scarcely any State of this Union, are the prescriptions of the fundamental law of so stringent a character. But in addition to this, I insist:

II.

That the law of June, 1867, is in contravention of the proviso of the 41st section of the National Currency Act, and therefore void.

This proviso provides that the shares can not be subjected to taxation "at a greater rate than is assessed upon the moneyed capital in the hands of individual citizens of the State."

I do not contend that this requires the tax authorities to ascertain the lowest rate of taxation on moneyed capital in any one of the very many municipal bodies into

which the State is subdivided, and that this should be taken as the maximum rate proper to be observed in the taxation of bank stock. I think that would be an unreasonable and impracticable rule. But I do insist that the rate should be the same as the rate upon moneyed capital in the hands of individual citizens in the various districts where the shareholders reside, and that that is the rate imperatively required by the proviso in question, taken in connection with the rules of taxation prescribed by the State Constitution.

It can not be denied that, generally, the taxation in larger cities is at a higher rate than in rural and small farming towns. Undoubtedly this is so in Illinois, as between the city of Chicago and county of Cook, and the smaller and poorer cities, towns and counties throughout that commonwealth, and as the decree herein was rendered upon evidence heard before the court (see decree, page 8,) that fact, is to be assumed as made out to the satisfaction of the Circuit Court.

The allegation of the bill is that the valuation was fixed at that prevailing throughout the county of Cook, and that the taxes were assessed in contravention of the National Currency Act.

The demurrer having been general, and not assigning specific grounds, as, for instance, that the bill was not sufficiently definite upon the particular points relied on, the averments are to be held as admitting of evidence in this regard, and the court appears to have taken proof upon it, which the appellant might have embodied in a certificate of evidence, but did not do so.

[By the Illinois practice, evidence is heard orally in chancery cases, and preserved by certificate in the same way as a bill of exceptions in trials at law.]

Ferris v. *McClure*, 40 Ill.. 99.

Smith v. *Newland*, Id., 100.

It therefore follows that the holders of national bank shares residing in taxing districts other than that of the bank's location, are subjected to a rate of taxation higher than that to which other moneyed capital is subjected in such districts, in direct contravention of the proviso in question.

It is unnecessary to add anything to this obvious conclusion.

The only case which occurs to me as bearing upon the subject is *Providence Institution* v. *City of Boston*, 101 Mass., 575, in which it is stated by the court: "In our judgment, it satisfies the meaning of the restriction, if the rate upon bank shares is the same as the rate upon moneyed capital in the hands of individual citizens in the town or city where the bank is located."

This language is, however, directed to the point before the court which related to the taxation of *non-residents* of Massachusetts, respecting whose shares the rate is undoubtedly that of the bank's location. The opinion is in effect in favor of the view for which I contend.

The legislation of Massachusetts upon the subject is exceedingly striking and apposite in this connection.

By the act of 1865, residents of the State were taxed upon their shares in the taxing districts in which they

respectively resided, while non-residents do not appear to have been taxed at all.

Chap. 242, *Stat.* 1865.

Supp. to Gen'l Stat. 1872, vol. 1, p. 416.

The act of 1867 continued the same mode, but directed the State tax commissioner to transmit to the several towns of the shareholders' residence the list of corporations, etc., subject to taxation.

Chap. 188, 1867, same vol., 560.

The act of June 11, 1868, which was considered in the case just cited, applied to *non-residents* only, and it specifically provided that residents should be taxed under the law of 1865.

Chap. 349, 1868, same vol., p. 671.

In 1871, the General Court enacted a law which changed the taxation to the *place of the bank's location*, but provided that the cities and towns of the shareholders' residence should be *credited* with the amounts collected. (Sec. 7.)

Chap. 390, 1871, same vol., p. 940.

But in 1872 the law of 1871 was *repealed*, and the taxation restored to the place of *residence* of the shareholder.

Chap. 321, 1872, same vol., p. 1025.

It would seem necessarily that such would be the only competent legislation in a State where the rule of proportionate taxation is as rigid as in Massachusetts.

Portland Bank v. *Apthorp*, 12 Mass., 252.

Comm. v. *Five Cents Savings Bank*, 5 Allen, 428.

Oliver v. *Washington Mills*, 11 Allen, 268.

It is interesting to note also that in *Austin* v. *Aldermen*, 14 Allen, 364, Austin, though a resident of Boston where he was taxed on his shares, objected that the law taxed others at *their* residence, instead of in Boston where they did *not* reside; but the court held that the mode provided was the proper and constitutional mode, and this was affirmed by this court in *Austin* v. *The Aldermen*, 7 Wallace, 694, although on another ground.

III.

The opinion of the Supreme Court of Illinois that the law of 1867 *is valid is erroneous, and this court is not bound to adopt its conclusions.*

In *McVeagh* v. *Chicago*, 49 Illinois, 310, this act was considered, but its constitutionality was neither argued nor passed upon.

But in *First Nat. Bank of Mendota* v. *Smith*, not yet reported, the court held (in February, 1873) that the law was within the legislative competency to pass, and it was accordingly sustained.

It is insisted that this adjudication is conclusive upon this court and decisive of this case. Is this so?

First. The decision of the United States Court was reached and announced in August, 1871. This was not, as appears from the opinion of the learned judge who pronounced it, until after effort had been made to bring the case before this court upon an agreed statement of facts, and that effort had failed. The decree was not

reached until December, 1872, and no appeal has, *as yet.* been prosecuted therefrom.

In the case at bar, the decree was rendered Dec. 5, 1872, and the record upon appeal filed herein October 16, 1873.

The act of Congress of June 30, 1870, provided that State revenue cases might be advanced and given precedence upon the docket.

To the September Term, 1872, of the Supreme Court of Illinois, a case was carried from the county of LaSalle and decided in February, 1873, adversely to the decision of the United States Court, nearly a year and a half after that decision had been arrived at and made known. There was no obstacle to the prosecution of the original case to this court long before any case was pending in the State courts at all.

Why the cases in the United States court should be permitted to languish until after the State Supreme Court had been heard from, is left to conjecture; but it is a proper argument for me to make, and I urge it upon this court, that as when the United States courts first obtain jurisdiction the State courts must give way, so, by analogy at least, when the United States court has declared a State law unconstitutional, no subsequent decision of the State courts can intervene to prevent an independent investigation and decision upon the merits, by this court.

To take any different view, is to permit appeals from the United States Circuit Courts to the State Courts, a thing most intolerable and not to be endured, and yet

which the State Court seems to consider to have been done in this instance.

Second. But as we have seen, the construction of the law of Congress is involved, and this being so, the State Courts can lay down no rule which this court is bound to follow.

Third. The legislation and judicial decisions in Illinois have *uniformly* agreed with the positions I have taken, up to the decision in question.

The legislation has always been, that the owner, or the person using or controlling property *in the State*, shall be taxed at the place of his residence. The judicial decisions have always been, that this is the only valid legislation under the Constitution; and that the constitutional rules require taxation districts, the taxation of all property within them, that the districts are confined to such property, and a general equivalent must be afforded to the tax-payer.

Trustees v. *McConnell*, 12 Ill., 140.
Chicago v. *Larned*, 34 Ill., 237.
Harward v. *St. Clair, etc.*, 51 Ill., 130.
Davenport v. *Supervisors*, 40 Ill., 197.
Dunleith v. *Reynolds*, 53 Ill., 45, and the numerous other cases cited *ante*.

It may therefore fairly be contended that rights have accrued in reliance upon such former decisions which it would be in bad faith to hold void under the last and contrary decision. This case arises in relation to past transactions. See *Chicago* v. *Sheldon*, 9 Wallace, 50, which was rested upon the ground of *contract*, although

relating to a special assessment, in regard to which this court overruled the *previous* ruling of the State Court.

Fourth. The case at bar also involves contract obligations. "A law which alters the terms of a contract by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligation, for, as stated on another occasion, such a law relieves the parties from the moral duty of performing the original stipulations of the contract, and it prevents their legal enforcement."

State Tax on Foreign-held Bonds, 15 Wallace, 320.

The shareholder is entitled to his dividends by the contract between him and the bank in which he holds stock. For the bank to withhold this legal right is to violate directly the obligations of the contract.

Fifth. While I concede it is the practice of this court to follow the latest settled adjudications of the State courts, giving construction to the laws and Constitutions of their own States, "it will not necessarily follow decisions which may prove but oscillations in the course of such settlement. Nor will it follow any adjudication to such an extent *as to make a sacrifice of truth, justice and law.*"

Gelpcke v. *Dubuque*, 1 Wallace, 175.

Still less will this be done in the case of a financial instrument of the Federal government, and particularly not, where the State decision is announced long after the decision of a United States tribunal, for to do so would be to reduce the latter to a pitiable state of subjection to

judicatures over which the national government exercises no control, and which may be influenced by considerations which can have no weight with the Federal judiciary.

It is here and here only that a mountain peak rises to the sky upon which no shadows fall.

I think the opinion and decision in question are, under the circumstances, anything but conclusive upon this court.

Does the argument of the Supreme Court commend itself to this court as founded on right reason, and a true construction of the State Constitution and the acts of Congress?

The remark is justified in the outset, that the opinion in question would be entitled to greater weight, had allusion to the opinion of the United States Court been omitted, as well as the illy-concealed attack upon the national banks, which have sought, in a proper and recognized form, legal redress from burdens illegally imposed upon their shareholders.

And I submit that the opinion discloses a want of apprehension of the precise ruling of the United States Court, which the State Supreme Court seems to consider before it for review and reversal.

It is declared that that ruling is, in effect, that all bank shares owned by non-residents can not be taxed. I do not understand that the United States court so decided, except as a consequence of the defects in the law as respects *residents*.

It is also insisted that the other point in the decision is that if property not legally subjected to taxation is included in the assessment, not only he whose property is illegally taxed, "but all other tax-payers, though their taxes are thereby *lessened* in amount, may avail themselves of his grievances and enjoin the collection of taxes assessed upon their property; and this upon the theory that the addition to the assessment roll of property *not* subject to taxation violates the constitutional requirement of equality and uniformity."

This, with all deference to the learned court delivering the opinion, is, I submit, so thorough and inexplicable a misapprehension as to nearly amount to discourtesy.

Respectable courts have indeed held that in case of the intentional omission from the assessment of large masses of property, the whole assessment might be invalidated (*Weeks* v. *Milwaukee*, 10 Wisconsin, 242,) but that is not the question here. On the contrary, I understand the ruling to have been that the rule of uniformity requires uniformity between members of the same class as well as between the different classes of property; that if residents outside the bank's district and non-residents of the State, escape taxation, the rule of uniformity is destroyed as to shareholders within the district; that the object of the legislature was to change the mode of taxation on banks, so as to subject *all* the shares to proper taxation, and if unconstitutional as to a large class of persons designed so to be taxed, the whole act is defeated in its object, and is so far an entirety that it all must stand or fall together.

It is the bank which brings the question before the court, and seeks relief from that multiplicity of suits and irreparable injury with which it is threatened, and upon its application the whole subject matter comes under review.

The gist of the objections to the law is not such as to present the case in any aspect as one of complaint by a tax-payer, that his taxes are lessened by the inclusion in the assessment, of non-taxable property, as the Supreme Court facetiously remarks.

If the law and assessment are void, that affirms this decree, whether the taxes of individuals are lessened or increased thereby, which forms no element in the inquiry.

Conceding that jurisdiction over either persons or property must exist, the court then enters upon a lengthy disquisition to prove, *not* that the *situs* of bank shares is changed by the act, but that *assuming this to be so*, the General Assembly had the power to effect it.

Decisions are cited to sustain the proposition, but seem to me entirely wide of the mark. Thus reference is had to the language of Judge STORY in his work on the Conflict of Laws (§ 550), as to the rule that personal property follows the residence of the owner, being a legal fiction, which is undoubtedly true as to tangible property not in his possession, because *the fact* is opposed to the rule.

Wilkey v. *Pekin*, 19 Ill., 160; *Mills* v. *Thornton*, 26 Ill., 300; *Dunleith* v. *Reynolds*, 53 Ill., 45; are cited, but they

relate to tangible personalty, and are in point in support of the positions which I take, and have so been hereinbefore alluded to.

The court refers also to *Supervisors* v. *Davenport*, 40 Ill., 198, which seems to me to be exceedingly apposite for the appellee, inasmuch as Davenport was taxed in respect to money which he "*used or controlled*" in Illinois. The court feels the force of this, and therefore says: "It might be said in reference to the latter case, that the possession of the agent was that of the principal. If this be conceded, it may also be said that the bank files this bill as trustee of the stockholders; and as such, possesses the lawful control over the rights and interests of the *cestuis que trust*, much greater than that of a mere agent for the loan of money."

But the answer to this is, that supposing the fact to be as stated, *this act does not purport to tax, and does not tax the bank as trustee for its shareholders.* So that the argument itself demonstrates the correctness of the conclusion of the United States Court.

It is said that this question was similarly expressly decided in *People* v. *Commissioners*, 35 New York, 413, and "not deemed of sufficient importance" to be raised before this court by which the judgment in that case was affirmed in 4 *Wallace*, 244.

But as to this I have to say that the New York case referred to was decided in June, 1866, when in the opinion of the Court of Appeals the language of the proviso to the 41st section the "place where the bank is located and not elsewhere" meant the *taxing district* and *not* the

State. It was this consideration that controlled the decision, so far as the point now being discussed is concerned, and that the New York court was laboring under misapprehension is sufficiently shown by the congressional construction in the act of Feb. 10th, 1868, that "the place" meant the *State* and not the district — that is, as Mr. Justice AGNEW had decided as early as 1867, the purpose of the words was "to localize the authority which imposes the tax," and *not* the assessment of taxes.

Nor was the question of the prescription of the *State* Constitution raised in the case in the Thirty-fifth New York, nor so far as I know are the provisions of the Constitution of that great commonwealth similar to those of that of Illinois.

It does not strike me as candid in the learned Illinois Court to cite the decisions of this court as made "without reference" to the question, as if it were not deemed worthy of attention, when the fact is that the decision was brought to this court under the 25th section of the Judiciary Act, and the reason for not considering that and other points is thus given by Judge NELSON: "Some other questions were discussed on the argument, besides those we have noticed, but they are questions of which this court *can not take cognizance.* We have examined all of them that are here under the 25th section of the Judiciary Act."

People v. *Commissioners*, 4 Wallace, 244, on p. 259.

The case at bar comes directly before this court on appeal from the decree of a circuit court of the United

States, and all questions are examinable here, as original questions, upon their merits.

To resume: the argument of the Supreme Court seems to be:

1. That the General Assembly has the power to give to bank shares an *actual situs*;

2. That by the act of 1867 this has been done, and that situs fixed at the taxing district of the location of the bank;

3. Therefore jurisdiction exists over *the property*, and the tax is valid.

I think I have shown that the minor premise is not well founded, because the act does *not* change the situs of bank shares; and that the major premise is not well founded, because that which is intangible can not be made tangible by legislation.

If either premise fails, the conclusion does not follow.

The argument would be better stated thus:

1. The General Assembly has power to establish a mode by which bank shares can be taxed at the place of the bank's location;

2. Such mode is provided by the act of 1867;

3. Therefore, the tax is valid.

I deny the minor premise *in toto*.

The act of 1867 provides for taxation *in personam* and

not *in rem*, and not against the bank as trustee, but against the individual owner.

But it is conceded that jurisdiction does not exist over the person so far as county, city, town and district taxes are concerned, if he does not reside in the district, town, city or county.

This concession disposes of the act.

I deny the major premise so far as municipal taxation is concerned, although it may be that some mode might be adopted to subject the shares to *State* taxes at the place of the bank's location, if it were thought worth while, which it does not seem probable that it would be.

It is unnecessary to consider this opinion further. It is evidently the result of misapprehension, and its reasoning, in itself unsatisfactory, proceeds upon the untenable assumption that the act of 1867 effects the purpose which the court proceeds to argue, the General Assembly had the constitutional power to effect.

I regard it as inconsistent in principle with the long series of prior decisions in Illinois which have been already cited, and as giving an erroneous construction to the State Constitution, arising from false premises as to the actual questions presented to the United States Court.

IV.

It is insisted that taxes levied by subordinate municipal corporations are "imposed by or under State authority," and therefore municipal as well as State taxes, may be levied under the act of Congress.

It seems to me matter of doubt whether this is so. If the taxation be confined to State taxes only, all difficulty in their assessment and collection is removed, as by the establishment of the system prevailing in Kentucky or elsewhere, levying a percentage once for all, and applying the taxes equitably for the relief of all parts of the State. But supposing municipal taxation were permitted, still the argument remains unimpaired that such taxation must be in accordance with the fundamental principles of all valid taxation, with the State Constitution and the act of Congress.

In the case at bar the exhibit attached to the bill of complaint (printed record, p. 4), shows that State, county, town and South Park taxes are included in the assessment. There is nothing in the record to distinguish the amount of the tax for each purpose, and the exhibit shows that it was the aggregate of all, which was demanded of the bank. If it be the intention of counsel to intimate that one portion of these taxes might be legal, and another portion illegal, and that the appellee ought to have tendered the payment of that portion which was legally levied, I have only to say,

First. That the *bank* was not charged with the duty of paying *any* of the taxes in question.

Second. That it was for the defendant in any case to answer and set up what, if any part of the assessment, was legal, or at least *stood on different ground* from any other portion.

I confess that I do not know why *any* part is lawfully levied, and I am certain that most of the taxes in ques-

tion are absolutely unlawful and void, as the South Park taxes, for instance. The wildest imagination can not suggest a reason for levying them.

Taxes for the city of Chicago are not before the court, but they are *in principle*, and I have to say that they would be utterly indefensible under this law. Thus by section 7 of chapter 1, amendments to the charter of the city of Chicago, approved March 9, 1867 (*Appendix Pub. Laws*, 1867, p. 5), it is made the duty of the assessors, acting under the authority of the city, to determine the valuation of the real and personal property in their respective districts, and section 7 defines the personal property to be so valued for municipal purposes, "all personal property of every nature and kind, having its *actual situs* within the city shall be assessed for municipal purposes in the district where *the same may be found*, whether the owner resides in the city or not." Section 16 provides that State laws for the assessment of real and personal property then in force, and that might thereafter be adopted, unless *in conflict* with this chapter or the acts to which it is an amendment, shall apply and govern in municipal assessments.

This limits taxation to property susceptible of an *actual* situs. Will it be pretended that the city of Chicago has power under such a law to tax the shares of persons not residing in said city?

V.

It is clear that the injunction and decree were properly granted and entered so far as the bank is concerned.

The bill alleges that the collector demands of the bank the payment of the whole amount of the taxes, and that they be deducted from any dividends declared upon the stock, and threatens to sell the shares unless the bank pays.

There can be no doubt that against such action the bank is entitled to the relief which it obtained.

No duty whatever was imposed upon the bank to pay these taxes, or to deduct the amount thereof from the dividends. Even in the case of non-residents, the dividends were to be retained, but the bank was not required by the law to pay their taxes.

The warrant did not run against the bank, but the individual shareholders. The point is too plain for argument, and has been distinctly ruled by HUNT, Justice, in *The First National Bank, etc.*, v. *Ira Fancher*, 48 New York, 527, and is thus stated:

"The authority given to a tax collector by his warrant is special and exceptional, and must be pursued according to its terms. When, upon an assessment roll, there appears an assessment against a stockholder in a bank for the amount of his stock, under the usual warrant attached, directing the collector to collect from the persons named, and to levy the same of their goods and chattels, the collector is not authorized to levy upon and collect the same of the property of the bank, although the bank holds funds with which the tax should have been paid. *A contract between the bank and its stockholders can not thus be enforced.*"

VI.

No question of jurisdiction is or could be, successfully raised in the case as the averments of the bill bring it clearly within recognized grounds of equity interposition as the prevention of multiplicity of suits, (*Dows* v. *City of Chicago*, 11 Wallace, 108,) and of that kind of injury which the law holds to be irreparable.

Osborn v. *Bank*, 9 Wheaton, 738.
Kerr on Injunctions, p. * 200.

And in Illinois, after some fluctuation, it is thoroughly settled that a court of equity will intervene to enjoin the collection of taxes where the assessment is void or the property not taxable.

Vieley v. *Thompson*, 44 Illinois, 9.
Cleghorn v. *Postlewaite*, 43 Ill., 428.
Darling v. *Greene*, 50 Ill., 424.
Supervisors v. *Webster*, 53 Ill., 141.

I presume that no such objection will be urged here, as it is desirable that the cause be decided upon the merits.

VII.

I have thus, as fully as practicable under the circumstances, presented the grounds upon which I believe this decree ought to be affirmed.

The opinion of the learned Judge of the Circuit Court, copies of which are herewith filed, speaks for itself, and its reasoning seems to me unanswerable.

Although where the law is plain, courts have nothing to do with consequences, it is nevertheless matter of gratification that any inconvenience produced by the affirmance of the decree upon the ground of the invalidity of the act of 1867, may be at once and easily remedied by the General Assembly, which is now in session.

I ought also to remark that it seems to me exceedingly clear that the taxation of the shareholder at the place of his residence is *the only mode* justified by the language of the proviso to the 41st section of the National Currency act of 1864.

Respectfully submitted.

MELVILLE W. FULLER,
Of Counsel for Appellee.

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Laws of Illinois

Taxation of owner resident
Chap. 89 Stat. Art. 12 Sec 4
(Ed. 1868) Gross Stat. 571
Chap. 103d - Gross Stat. p. 755

County taxes vary with valuation and
levying 44 Illinois 444
Chap. 89 Stat. Sec. 44, 47
Gross Statutes pp. 581
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School taxes. Chap. 98 Statutes
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Town & Road Taxes -
Chap. 103d (Sec.)
Gross Stat. p. 760

Chicago Charter 1867
Chap. 1 Sec 7 & 17
pp. 5 & 9

U. S. CIRCUIT COURT,

Nor. Dist. of Illinois.

OPINION DELIVERED AUGUST, 1871.

UNION NATIONAL BANK

vs.

CITY OF CHICAGO AND CITY COLLECTOR; MERCHANTS' NATIONAL BANK AND OTHERS *vs.* THE SAME.

IN CHANCERY:

1. Under the 57th section of the National Currency Act of June, 1864, suits may be maintained *by*, as well as against; National Banks, in the United States Courts of the district of their location.
2. Courts of Equity will not enjoin the collection of taxes, on the *sole* ground of their illegality—some well recognized ground of equity interposition must exist.
3. Such a ground is found in the prevention of a multiplicity of suits, or of injury for the redress of which the remedy at law is not so certain, adequate, and complete as in equity.
4. National Bank shares can not be included in the valuation for taxation by or under State authority, at a higher value than the denominational or par value thereof.
5. The reason is, that under the National Currency Act, as construed by the Supreme Court of the United States, the limited State taxation permitted is one of the conditions annexed to the grant of the

franchise, and the shares are subjected to it without regard to the capital, property, or investments of the bank, and, therefore, such taxation is in the nature of a royalty upon the nominal value of the share.

6. Taxes levied in the absence of persons or property, are *ultra vires* and void. Jurisdiction is as essential to valid legislative as judicial action.
7. Shares of stock represent a property interest, separate from the capital and property of the corporation, and, being incorporeal and intangible, are incapable of having an *actual situs*, save at the owner's domicil.
8. The State law of June, 1867, conflicts with the State Constitution, because it directs taxes to be assessed by the authorities of counties, towns, cities, and districts, upon the shares owned by shareholders in the county or town where the bank is located, without regard to the residence of the owner, or the *situs* of the shares;
9. And, being void as to all shareholders not residing in the district of the location of the bank, it is also as to those who do reside there;
10. And if the law be not valid as to residents of the State, the shares of non-residents can not be taxed under it, as that would be in contravention of the law of Congress, and the Federal Constitution.

BLODGETT, J.

The questions involved in these ten cases are substantially the same, and the conclusions reached, so far applicable to all, as to require no particular allusion to the difference in facts between them.

Bills are filed by these complainants setting up the invalidity of the assessment of certain taxes upon the shares of the capital stock of the respective corporations, for the years 1867 and 1870, by the authorities of the city of Chicago, and praying for an injunction against the city collector from attempting the collection thereof. The complainants aver that demand has been made upon them for the payment of the taxes in question, and threats made of a sale of the shares if they do not comply, that their shareholders notify them not to make

such payment, and that they are exposed on the one hand, if they pay, to suits by their shareholders, and on the other hand, to serious injury, for which a suit at law affords no adequate remedy, if they do not pay; and that, in either event, a multiplicity of suits will be prevented by a determination in equity of the question of liability. They insist that as the trustees and representatives of their stockholders, they are entitled to maintain these actions, and for the reasons above indicated, to the relief sought.

A preliminary objection is raised on behalf of the defendants, that as the banks are located in the northern district of Illinois, and the defendants also reside there, the court has no jurisdiction to entertain these suits. It has, however, been decided by the Supreme Court of the United States in Kennedy v. Gibson, 8 Wallace, 498, that under the 57th section of the National Currency Act, suits may be brought *by*, as well as *against*, associations organized under that act, in the United States courts of the district in which such associations are established. It is true that the word "by" is omitted from the text of this section, but the court hold that reading the section by the light of another of a prior act on the same general subject, the omission is to be regarded as an accidental one. This court can not therefore decline to take jurisdiction because these banks are established, and the defendants reside in the same district.

It is further objected that these bills are improvidently filed in view of the rule laid down in Dows v. The City of Chicago, 11 Wallace 108, that a suit in equity will not lie to restrain the collection of a tax on the *sole* ground that the tax is illegal, but there must exist, in addition, special circumstances, bringing the case under some recognized head of equity jurisdiction. Conceding this to be so, it is not decisive of these cases, as the question still remains whether any such ground of equity interposition is shown to exist here. And it appears to me that such grounds do exist.

The banks occupy, as it were, the position of stakeholders. They are the custodians of the property, money and funds of the shareholders, when the latter become entitled thereto, as in case of the declaration of dividends. The shareholders insist that their dividends shall be paid to them. The collector demands that they shall be paid to him, or a sufficient amount thereof to defray the taxes. And the banks invoke the aid of a court of equity to determine to which of the parties the funds belong or should be paid. They assert, and the bills upon this motion are to be taken as true, that they are notified by their shareholders that if they pay these taxes suits will be commenced at once against them. At the same time if they do not, the State law not only, at least so far as non-resident shareholders are concerned, undertakes to make their officers personally responsible for the amount,

which would be, perhaps, immaterial if the assessments be invalid, but the collector threatens to sell the shares to make the taxes therefrom.

It is obvious that the latter course, if taken, would operate to prejudice these corporations in the public mind, and lead to further and harassing litigation, working that kind of injury to the corporation which, because the law affords no such beneficial and complete remedy for it as the nature of the case requires, may be deemed irreparable.

Reference to the case of Dows confirms this view. Mr. Justice FIELD, in delivering the opinion, says in regard to the cross-bill filed by the Bank in that case, that it presents different features from those of the original bill. That the Bank "insists that if it paid the tax levied upon the shares of all its numerous stockholders out of the dividends upon their shares in its hands, which it is required to do by the law of the State, or if the shares were sold, it would be subjected to a multiplicity of suits by the shareholders, and were it an original bill the jurisdiction of the court might be sustained on that ground." This clearly intimates the judgment of the Supreme Court upon this branch of the case, and is, to such an extent, authority in favor of the jurisdiction, that I feel bound to follow it.

I find myself compelled, then, to pass upon the validity of the taxes in question. Courts interfere with the collection of taxes with reluctance, but when questions directly calling for judicial action

are presented, there is no alternative but to decide them, although they may involve the legality of revenue proceedings. The provisos to the 41st section of the National Currency Act of 1864 are as follows:

"*Provided*, That nothing in this act shall be construed to prevent all the shares in any of the said associations held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under State authority, at the place where such bank is located and not elsewhere; but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State: *Provided further*, that the tax so imposed under the laws of any State upon the shares of any of the associations authorized by this act shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the State where such association is located. *Provided also*, that nothing in this act shall exempt the real estate of associations from either State, county or municipal taxes to the same extent, according to its value, as other real estate is taxed."

And by the act of February, 1868 (15 Stat. at Large, 34) the words "place where the bank is located, and not elsewhere," are declared to mean "*the State* in which the bank is located," thereby localizing the authority imposing the tax, but not the assessment of taxes at the place of the location of the bank. It is subject to these limitations, that taxes may lawfully be levied by or under State authority.

In three of the cases before the court, complainants insist that the assessment of taxes attempted to be made upon their shares is illegal and void, because the municipal authorities charged with the duty of assessing taxes have placed those shares in the valuation for taxation at a sum above the par or denominational value thereof, varying from ten to twenty per cent. And the question is, can national bank shares be valued for taxation at a higher valuation than the par value of the share?

In Van Allen v. The Assessors, 3 Wallace, 572, it was insisted that in levying taxes upon the shares of national banks, regard should be had to the fact that a part or the whole of the capital of such associations was invested in national securities, declared by the statutes authorizing them to be "exempt from taxation by or under State authority."

In the dissenting opinion of the Chief Justice (Wayne and Swayne both concurring), the position is ably argued that these shares can not be subjected to taxation by the State, irrespective of the mode of investment of the capital in securities exempted from taxation, and the Chief Justice, *inter alia*, says that what the assessor would have to do is "to ascertain the value of the whole property of the association, and deduct the amount of bonds. The remainder, divided by the number of shares, would give the value of each share to be taxed, and the assessor must value the whole property and divide

it by the number of shares, in order to make a true valuation of shares. If he does not do this, he must assess the shares at an arbitrary or speculative valuation. This is not what is required. The law demands true valuation; and true valuation, with deduction of bonds, places the shareholder on exact equality with the holder of other moneyed capital, which the law also demands. No other mode of valuation secures that equality."

The majority of the court, however, held that the limited State taxation allowed by the act was but a condition annexed to the enjoyment of the new use and application of the United States bonds, to which they were enabled to be put under the grant of the franchise, and imposed as a burden thereon, and in that aspect, that the interest of the shareholder could be taxed within the limit of the act without reference to the property and capital of the bank; and the learned judge, Nelson, who delivers the opinion, reviews the various sections of the law to sustain this proposition.

The conclusion reached and the reasoning upon which it rests, taken in connection with the language of the dissenting Judges, leave no doubt in my mind that the court regarded the tax as in the nature of a royalty for the grant, annexed to the franchise. The ruling is distinctly that taxes by the State are permitted to be imposed wholly irrespective of the character or description of the property or capital of the bank; and this being so, it logi-

cally follows that the par value of the share is the fixed value for taxation, whether the shares may be said to have an actual value above or below the nominal amount. These bills allege that the shares in these instances have no market value, and that the assessing authorities have affixed a valuation higher than par, arbitrarily and without resort to any basis of values whatever. It is clear that this cannot be done, and, as we have seen, it is equally true, under the decision just referred to, that the values can not be determined by reference to the capital, property and investments of the bank; for if this were so, then the deductions must be allowed, which the Supreme Court has held cannot be done for the reasons given. Reference to the different sections of the act confirm this view. They provide for a certificate of the numbers of the shares; the division of the capital stock into shares of one hundred dollars each; the personal liability of the shareholder to an amount equal to the sum invested and the par value of the shares held; the casting of one vote for each share; the payment in of the amount of the share in specified installments; a list of the number of shares held by each shareholder, open to the inspection of State tax assessors, etc., etc., and the term "share" is used throughout in the same signification. The personal liability clause is, perhaps, as noticeable as any other, in the way of illustration. The shareholders of the association are held individually responsible, equally and rata-

bly, and not one for another, for all contracts, debts and engagements of such association to the amount of their stock therein *at the par value* in addition to the amount invested in such shares. This provision is not of itself conclusive, but it bears with much weight in favor of the position, and other provisions might be cited more at length than has been done, as tending to sustain it.

It could never have been intended that the assessing authorities should be permitted to exercise an arbitrary and unlimited discretion, and it seems to me that the whole tenor of the act, and of the decisions of our highest judicial tribunal upon questions arising under it, satisfactorily indicate that the State authorities have no power whatever to tax these shares above the value thereof, as fixed by the act itself.

The error in these cases is a fundamental one. It is not a mere irregularity. It goes to the very foundation of the tax, and renders it wholly inoperative and void.

It is also claimed, in all these cases, that the tax attempted to be levied for the year 1867 is void because of the invalidity of the State law of June, 1867.

Other objections to the legality of this tax are urged, but the view which I take of the main question renders their consideration unnecessary.

I may remark, however, in passing, that I do not, as at present advised, perceive how the present City

Collector can lawfully proceed upon the warrant issued in 1867. These warrants stand upon the same principle as writs of *fieri facias*, and it would seem that the common law rule, that the officer receiving the process to execute should complete it, applies. But I need not dwell upon this point, as it becomes immaterial under the circumstances.

The validity of the law of 1867 is questioned upon the ground that its provisions are in contravention of the State Constitution. The law was passed, and the assessment of taxes complained of made, under the Constitution of 1848.

Sections 2 and 5 of Article IX of that instrument are as follows.

"2. The General Assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property."

"5. The corporate authorities of counties, townships, school districts, cities, towns and villages, may be vested with power to assess and collect taxes for corporate purposes, such taxes to be *uniform in respect to persons and property*, within the jurisdiction of the body imposing the same. And the General Assembly shall require that all the property within the limits of municipal corporations, belonging to individuals, shall be taxed for the payment of debts contracted under authority of law."

And by a series of adjudications of the Supreme Court of Illinois, it has become settled law that these provisions are *restrictions* upon the power of

taxation by the Legislature, or any authority under it. All taxes, therefore, assessed by municipal corporate authorities, must be proportionate and uniform within the jurisdiction of the body imposing them. Where there is jurisdiction neither of persons nor property, the imposition of a tax would be *ultra vires* and void. Jurisdiction is as necessary to valid legislative as to valid judicial action.

Shares of stock are incorporeal personal property, and as such are held incapable of having any situs, save at the domicil of the owner. In the eye of the law they have in themselves no locality. They accompany the person of the owner where he goes, and he may deal with them and dispose of them according to the law of his domicil, which, if he die intestate, governs their disposal.

The peculiar character of this class of property is adverted to by Mr. Justice NELSON in the case of Van Allen, already cited. He says: "A striking exemplification may be seen in the case of The Queen v. Arnoud. The question related to the registry of a ship owned by a corporation. Lord Denman observed: 'It appears to me that the British corporation is, as such, the sole owner of the ship. The individual members of the corporation are no doubt interested in one sense in the property of the corporation, as they may derive individual benefits from its increase or loss from its decrease, but in no legal sense are the individual members the owners.'"

The shareholders are not the owners of the bonds, investments, surplus and property of the Bank. They possess only the intangible right to the dividends, if any, upon their shares, and to the residuum upon the winding up of the corporation. The distinction between such a right and personal property capable of an *actual situs* is obvious. And it is a distinction which seems to have been borne in mind in the enactment of the city charter which provides for the taxation only of such personal property as has its *actual situs* within the city, and further that State laws then in existence or which might after wards be adopted, shall govern in municipal assessments, unless *in conflict* with the provisions of the charter.

The act of June, 13, 1867, directs taxes to be assessed by the authorities of counties, towns, cities and districts upon the shares of these banks in the county or town where the bank is located, without regard to the *residence of the owner or the situs of the shares*, and in that respect I regard it as a violation of the Constitution of the State.

The complainants show, and it is not denied, that their shareholders are scattered over the State, and through other Stases, and such taxation upon them appears to me a clear infringement of the Constitutional requisition that all assessments by the corporate authorities of cities, etc., shall be uniform in respect to persons and property within their limits. This compels the taxation of the

stock owned by residents of the State in the county, city, town or district where they reside, for the purpose of collecting county, city, town or district taxes, and a failure to do so destroys the rule of uniformity with respect to property within the limits of the body imposing the taxes, while neither the persons nor property are within the jurisdiction of the taxing power at the place of the bank's location. If, then, this statute is void as to those who do not reside in the district where the bank is located, it must be so as to those who do, because it would be then undeniable that every person would not be obliged to pay a tax in proportion to the value of his or her property, and the taxes for State purposes would not be levied with uniformity. And if the law be not valid as to shares of stock belonging to residents, the shares of non-residents cannot be taxed, because the provisos of section 41 of the act of 1864, inhibit any tax upon non-residents that is not imposed upon residents of the State, and such a regulation would be in conflict with the Federal Constitution which says "the citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States." I cannot avoid the conclusion that this law violates the imperative rule of the Constitution.

It ought to be observed, that, when the Act of June, 1867, was passed, controversy had arisen as to the meaning of the words in the provisos

to the 41st section of the law of Congress, that the shares should be assessed "at the place where the bank is located." The language of the proviso is not perspicuous, and, I am inclined to think, that the framers of this law supposed Congress to have required the shares to be assessed in and for the benefit of the taxing district of the bank's location. It is not unnatural that this view should have been entertained. Courts of the highest respectability arrived at this conclusion, as in Maine and New Hampshire, while others, as in Massachusetts and Pennsylvania, were of a different opinion. In Massachusetts, the law for the assessment of national and other bank shares, provided that this should be done at the residence of the respective shareholders, and the question was raised, that this was contrary to the proviso of the 41st section; but the Supreme Court of the State held otherwise, and their judgment was affirmed by the United States Supreme Court, though upon another ground. The subsequent action of Congress by the passage of the law of February, 1868, confirmed the correctness of the views of the Massachusetts Court, and resolved the doubt in favor of the position that the intention was to localize the authority imposing the tax, and not the assessment of taxes at the place of the location of the bank.

The anomalous provision in the Illinois Act of 1867, which gives the collector of the particular taxing locality, a kind of "roving commission" to

execute his warrant anywhere within the limits of the State, is a sufficient indication of the embarrassment that was felt by the General Assembly in framing this enactment.

The defects, however, may be readily remedied by the State Legislature. Upon the argument of these applications, it appearing that the questions involved were of sufficient importance to demand, and both parties being desirous of obtaining, the decision by the tribunal of last resort, and there being apparently no substantial dispute as to the facts, I suggested to counsel the propriety of making an agreed case, that a final result might be obtained as speedily as possible; but, as the suggestion was not acted on, I have, in the discharge of my judicial duty, passed upon the questions myself, so far as necessary to determine these preliminary motions.

The injunction, as prayed, will be granted.

Ordered accordingly.

FULLER & SMITH, for Complainants.

M. F. TULEY, for Defendant.

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disrespectful, but also as the expression of an intention to disobey and treat with contempt an order of the court, and believing then, as he still believes, that petitioner intended to intimidate him in the discharge of his duties, in which belief he is sustained by a second report made

RETURN TO RULE.—FILED APRIL 16, 1874.

1 EX PARTE: JAMES S. ROBINSON, PETITIONER. } Original, No. 14.

To the Supreme Court of the United States:

The judge of the district court of the United States for the western district of Arkansas, responding to a rule served upon him March 23d, 1874, requiring him to show cause why a writ of mandamus should not issue to him, directing him to revoke his order of July 28, 1873, disbarring petitioner, and to restore him to the roll of attorneys practicing in said court, respectfully shows:

1st. That at the time respondent made said order he was holding a session of the district court of the United States for the western district of Arkansas, presiding as judge thereof. Said order was a judgment of a court in regard to a matter within the scope of its jurisdiction, made in the exercise of a sound judicial discretion, and having for its object the maintaining of the dignity of the court by punishing petitioner for a gross contempt of court committed by him in open court, and tending to impair the respect due its authority. That said
2 order was not an arbitrary or a despotic exercise of power, nor was it inspired by caprice, passion, prejudice, or personal hostility.

2d. That on the 16th day of July, A. D. 1873, an order was made by the district court of the United States for the western district of Arkansas, upon information received from the grand jury, then in attendance upon said court, requiring petitioner to show cause why he should not be punished as for a contempt for an alleged obstruction of public justice, and that afterwards, on the 18th of July, inst., petitioner contemptuously and defiantly refused to respond thereto, and has since neglected and refused, and still continues to refuse, to respond thereto. That after petitioner refused to respond to said rule, the court made the said order of July 20th, A. D. 1873, disbarring petitioner.

3d. That on the 16th day of July, A. D. 1873, an order was made by the district court of the United States for the western district of Arkansas, upon information received from the grand jury then in attendance upon said court, to show cause why he should not be punished as for a